TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 459. 217.

W. P. H. McFADDIN IN HIS OWN RIGHT AND W. F. H. McFADDIN AND JAMES A. McFADDIN, EXECUTORS OF WILLIAM McFADDIN, DECEASED, PLAINTIFFS IN ERROR,

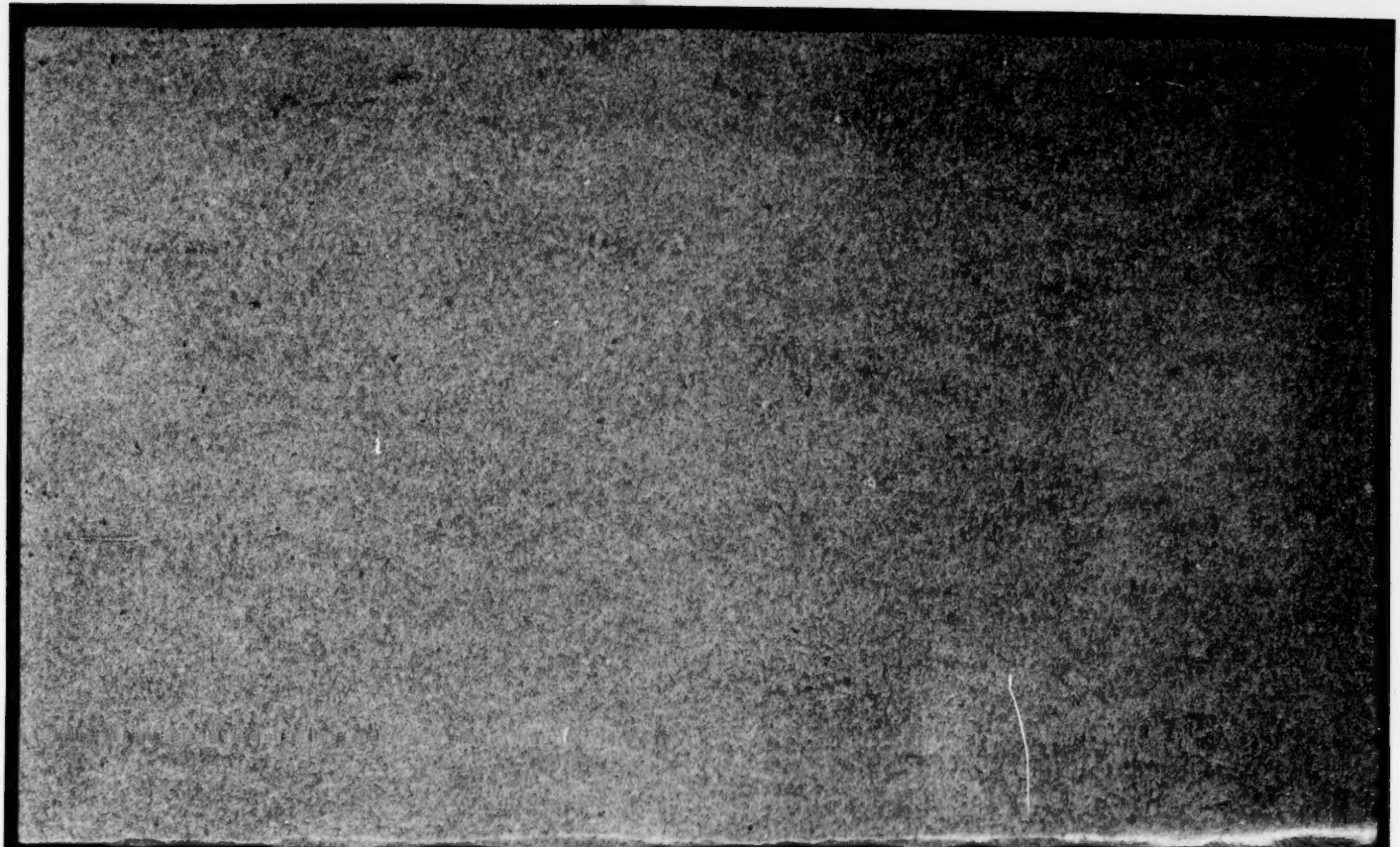
vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. S. SPALDING, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 21, 1900.

(18,005.)



(18,005.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 520.

W. P. H. McFADDIN IN HIS OWN RIGHT AND W. P. H. McFADDIN AND JAMES A. McFADDIN, EXECUTORS OF WILLIAM McFADDIN, DECEASED, PLAINTIFFS IN ERROR,

vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPALDING, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	*a*	1
Writ of error	*a*	1
Clerk's return to writ of error	*b*	2
Citation and acceptance of service	*b*	3
Caption to transcript from United States court of appeals, Indian Territory	*c*	3
Transcript from United States court, northern district of Indian Territory	1	4
Recital of filing of complainant, etc.	1	4
Record entry of filing of interplea of Evans-Snider-Buel Co.	1	4
Interplea of Evans-Snider-Buel Co.	1	4

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1900.

	Original.	Print
Entry of filing of interplea of Evans-Snider-Buel Co. on January 27, 1897	2	5
Interplea of Evans-Snider-Buel Co., filed January 27, 1897	2	5
Recital of entry of judgment in favor of plaintiffs against defendant J. R. Blocker, etc	3	5
Order setting aside order transferring cause to Tahlequah	3	6
Order of April 2, 1897, transferring cause to Tahlequah	3	6
Record entry of filing of answer to interplea	4	6
Answer to interplea of Evans-Snider-Buel Co.	4	7
Jury impanelled; trial April 20, 1897	5	7
Verdict and judgment on the interplea, April 21, 1897	5	8
Order overruling motion for a new trial on the interplea	5	8
Mandate of United States court of appeals, Indian Territory	6	9
Order transferring cause to Wagoner, Indian Territory	7	10
Order to record mandate of United States court of appeals, Indian Territory	8	10
Order reviving cause in name of executors of William McFadden	9	11
Bill of exceptions	9	12
Testimony for interpleader	10	12
Chattel mortgage, John R. Blocker to H. M. Pollard, trustee, April 23, 1896	11	13
Chattel mortgage, John R. Blocker to H. M. Pollard, trustee, May 19, 1896	18	19
Chattel mortgage, John R. Blocker to H. M Pollard, trustee, January 22, 1896	23	24
Chattel mortgage, John R. Blocker to H. M. Pollard, trustee, February 6, 1896	29	29
Note, John R. Blocker to Evans-Snider-Buel Company, $14,012.41, January 22, 1896	33	33
Note, J. R. Blocker to Evans-Snider-Buel Company, $3,642.15, February 6, 1896	34	33
Note, John R. and Cornelia Blocker to Evans-Snider-Buel Co., $14,758.06, February 25, 1896	34	34
Note, J. R. Blocker to Evans-Snider-Buel Co., $10,520, March 9, 1896	34	34
Note, J. R. Blocker to Evans-Snider-Buel Co., $10,541, March 9, 1896	35	34
Note, J. R. Blocker to Evans-Snider-Buel Co., $10,563, March 9, 1896	35	35
Note, J. R. Blocker to Evans-Snider-Buel Co., $10,585, March 9, 1896	35	35
Note, J. R. Blocker to Evans-Snider-Buel Co., $10,560, March 9, 1896	36	35
Note, J. R. Blocker to Evans-Snider Buel Co., $10,582, March 9, 1896	36	35
Note, J. R. Blocker to Evans-Snider Buel Co., $10,597, March 9, 1896	36	36
Note, J. R. Blocker to Evans-Snider-Buel Co., $5,222, March 25, 1896	36	36
Note, J. R. Blocker to Evans-Snider-Buel Co., $5,278, March 25, 1896	37	36

	Original.	Print
Note, J. R. Blocker to Evans-Snider-Buel Co., $5,323, March 25, 1896	37	37
Note, J. R. Blocker to Evans-Snider-Buel Co., $3,087.47, May 6, 1896	37	37
Note, J. R. Blocker to Evans Snider-Buel Co., $3,115.08, May 6, 1896	37	37
Note, J. R. Blocker to Evans-Snider-Buel Co., $3,641.60, May 19, 1896	38	37
Note, J. R. Blocker *et al.* to Evans Snider-Buel Co., $3,783.70, March 10, 1896	38	38
Order of attachment with summons and marshal's return in case of McFadden *et al. vs.* Taylor *et al.*	38	38
Admission that property levied on is same as described in mortgages	41	40
Admission that plaintiffs had actual notice of the mortgages at time levy was made, etc	41	40
Testimony of Amos T. Atwater	41	41
Admission of plaintiffs that notes evidence indebtedness for which mortgages were executed	42	41
Testimony of John R. Blocker	43	43
Admission as to location of cattle mentioned in mortgages	44	43
Testimony for plaintiffs	45	44
Record entry of filing of interplea of Evans-Snider-Buel Co.	46	45
Judgment in case of McFadden *et al. vs.* Blocker	47	46
Motion to instruct jury to find for interpleader	47	46
Motion to instruct jury to find for plaintiffs, and exception to ruling thereon	47	46
Exception to ruling on motion to instruct jury to find for interpleader	48	46
Stipulation that if court of appeals in Indian Territory reverses judgment of trial court it shall enter final judgment	48	47
Verdict	48	47
Plaintiffs' motion for a new trial	49	47
Judgment for interpleader	49	48
Certificate of judge to bill of exceptions	49	48
Clerk's certificate to transcript	50	48
Opinion of the court	51	49
Order: Cause submitted to United States court of appeals, Indian Territory	67	62
Opinion of United States court of appeals, Indian Territory	67	63
Judgment of United States court of appeals in the Indian Territory	80	73
Petition for writ of error	82	75
Assignment of errors	83	76
Supersedeas bond	85	78
Clerk's certificate to transcript	87	80
Appearance for plaintiffs in error	88	81
Appearance: Mr. Pollard, for plaintiffs in error	88	81
Appearance for defendants in error	89	81

	Original.	Pri
Order of submission	89	8
Opinion of United States circuit court of appeals	91	8
Judgment of United States circuit court of appeals	110	10
Petition for writ of error	111	10
Assignment of errors	112	10
Bond on writ of error	114	10
Writ of error and clerk's return	117	10
Citation and acknowledgment of service	119	10
Clerk's certificate to transcript	120	10

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1900, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the seventh day of May, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1900, a transcript of record, pursuant to a writ of error directed to the United States court of appeals in the Indian Territory, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein Evans-Snider-Buel Company and others were plaintiffs in error, and W. P. McFadden and others were defendants in error; which said transcript of record is in the words and figures following, to wit:

EVANS-SNIDER BUEL COMPANY, C. W. Turner, H. B. Spaul-ing, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *versus* W. P. H. MCFADDEN in His Own Right and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.	No. 250.	Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable chief justice and judge of the United States court of appeals for the Indian Territory, Greeting:

Because, in the records and proceedings, as also in the rendition of judgment of a plea which is in the said United States court of appeals for the Indian Territory, before you at the January term, 1900 thereof, between W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, appellants, and Evans-Snider Buel Company, and C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, sureties, appellees, manifest error hath happened, to the great damage of Evans-Snider Buel Company, appellees, and its sureties aforesaid, as by their com-

plaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, definitely and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have said records and proceedings aforesaid at the city of St. Louis, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, within sixty days from this date, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein
b to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of January, in the year of our Lord, nineteen hundred. Issued at office in South McAlester, Indian Territory, with seal of the United States court of appeals for the Indian Territory, and the date as aforesaid.

Seal United States Court of Appeals in the Indian Territory.

WM. P. FREEMAN,
Clerk United States Court of Appeals for the Indian Territory.

Allowed:
WM. H. H. CLAYTON,
Justice of the United States Court of Appeals for the Indian Territory.

Filed January 13th, 1900.
WM. P. FREEMAN, *Clerk.*

UNITED STATES OF AMERICA, *Indian Territory,* } ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof, I (*have to*) subscribe my name and affix the seal of the United States court of appeals in the Indian Territory, at office in the city of South McAlester, this 17th day of February, A. D. 1900.

WM. P. FREEMAN,
Clerk United States Court of Appeals in the Indian Territory.

The United States of America to W. P. McFadden in his own right and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased. Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the United States court of appeals in the Indian Territory, wherein Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. H. Clayton, chief justice of the United States circuit court of appeals in the Indian Territory, this sixth day of February, in the year of our Lord one thousand nine hundred.

WM. H. H. CLAYTON,
Chief Justice of the United States Court of Appeals in the Indian Territory.

Service accepted this 10th day of Feb'y, 1900.
WILLIAM T. HUTCHINGS,
Att'y for Def'ts in Error.

No. —. United States circuit court of appeals, eighth circuit. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. H. McFadden *et al.*, defendants in error. Citation on writ of error. Filed 14th day of February, 1900. Wm. P. Freeman, clerk.

UNITED STATES OF AMERICA, *Indian Territory,* } ss:

In the Court of Appeals.

Pleas and proceedings in the United States court of appeals in the Indian Territory, at the city of South McAlester, before the Honorable William H. H. Clayton, chief justice, and the Honorable John R. Thomas, Hosea Townsend, and Joseph A. Gill, associate justices.
WILLIAM P. FREEMAN, *Clerk.*

W. P. H. MCFADDEN ET AL., Appellants,
versus
JOHN R. BLOCKER ET AL., Appellees.

Be it remembered, that heretofore, to wit, on the 3rd day of June, A. D. 1899, there was filed in the office of the clerk of the United States court of appeals in the Indian Territory, a transcript of the United States court for the northern district of the Indian Territory, at Wagoner, in the above cause, which is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern Judicial District, }

Pleas in the United States court for the northern district of the Indian Territory, at Wagoner, in the cause numbered 251 and entitled William McFaddin & Son, plaintiff-, and J. R. Blocker and other-, defendants.

Honorable William M. Springer, judge of said court.

On the 17th day of June, A. D. 1896, there *was* filed in the office of the clerk of said court, at Muskogee, the complaint, affidavit, and bond for attachment in the above numbered and entitled cause, and on the same day there was issued by said clerk of said court the writ of attachment with summons in said cause, which said writ of attachment and summons with the return of the marshal of said court duly endorsed thereon will be found on page — to page — of this transcript.

At a regular term of the United States court for the northern district of the Indian Territory, begun and held at the court-rooms at the town of Muskogee, in said Territory, and on the first day of December A. D. 1896.

Present: Honorable William M. Springer, judge of said court.

On the 12th day of December, A. D. 1896, the same being one of the regular days of said term of court, among the proceedings had was the following, to wit:

WM. McFADDIN & SON }
vs.
J. R. BLOCKER ET AL. }

Interplea of Evans, Snyder Buel Co. Filed.

Said interplea is in words and figures as follows, to wit.

In the United States Court in the Indian Territory, Northern District, at Muskogee.

WM. McFADDIN & SON, Plaintiffs, }
vs.
JAMES W. TAYLOR ET AL., Defendants. }

Interplea and affidavit.

Comes now Evans, Snyder Buel Company, a corporation organized under the laws of the State of Illinois, and represents
2 that it is the owner and entitled to the possession of the following-described cattle now in pastures near Summit, Indian Territory. 6,775 head of cattle, of which 5,140 are three and four year old steers and 1,635 are cows. Said cattle are branded as follows: 820 head of steers branded 7S on left side, 1,653 head of steers branded on left side, 922 head of steers branded O K on right side, 515 head of steers branded on hip and side, 187 head

head of steers branded 77 on left side, 320 head of steers branded on left side, 198 head of steers branded on left side, 525 head of steers branded R or M on left side, 205 head of cows branded H S — on left side, 260 head of cows branded on left side, 1,170 head of cows branded Ta on left side.

That said property has been levied on as the property of J. R. Blocker by virtue of an attachment issued in this cause, dated June 17, 1896, wherein Wm. McFaddin & Son are plaintiffs and James W. Taylor *et al.* are defendants, which cause is now pending in said court.

MARCUM, FEARS & OWEN,
Att'ys for Defendants.

Now comes S. S. Fears as agent of Evans, Snyder Buel Company and on oath states that the allegations in the foregoing interplea and affidavit are true as he verily believes.

S. S. FEARS, *Agent.*

Subscribed and sworn to before me this 12th day of December, 1896.

MYRTA L. EDDLEMAN.

Endorsed: "Filed Dec. 12, 1896. Jas. A. Winston, clerk."

Thereafterwards, to wit: and on the 27th day of January, A. D. 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Interplea of Evans, Snyder Buel Co. Filed.

Said interplea is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Northern District.

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Interplea.

3 Now comes Evans, Snyder Buel Company, a corporation organized under the laws of Illinois, and for its interplea says:

That it is the owner of and claims six thousand four hundred and seventy-five head of cattle levied on by virtue of an attachment in favor of Wm. McFaddin & Sons *vs.* J. R. Blocker *et al.*, on June 29th, 1896, in said northern district by S. M. Rutherford, marshal of said district, after which levy interpleader claimed said cattle under oath, and gave bond as interpleader, as required by law, which was on

the 14th day of July, 1896, approved by said marshal and said cattle left with the interpleader. Interpleader further says that said cattle were not subject to levy as the property of J. R. Blocker or as the property of any of the other defendants named in said writ of attachment.

Wherefore, interpleader prays for a judgment against plaintiffs and establishing its claim to said cattle for two thousand dollars damages.

MARCUM, FEARS & OWEN,
STUART, GORDON & HAILEY,
Att'ys for Interpleader.

Endorsed: "Filed in open court Jan. 27, 1896. Jas. A. Winston, clerk."

Thereafter, to wit, on January 29th, 1897, the same being one of the regular days of said term of said court, judgment by default was entered in said case against the defendant, J. R. Blocker, and in favor of the plaintiffs, for $55,875.71, and judgment sustaining the attachment was also entered in said cause, and the venue of this case was changed to this court sitting at Tahlequah on motion of the plaintiffs. A full account of these proceedings had in said court will be found on pages — to — of this transcript.

And thereafterwards, to wit, on the 13th day of February, 1897, the following order was made and entered of record, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Order transferring case to Tahlequah set aside.

And thereafterwards, to wit, on the 2nd day of April, 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

4 On motion of plaintiffs, it is ordered that this cause be, and the same is hereby, transferred to this court at Tahlequah; it is therefore ordered that the clerk of this court at Muskogee transmit to the clerk of this court at Tahlequah all papers together with a transcript of the proceedings in said cause.

At a regular term of the United States court for the northern district of the Indian Territory, at Tahlequah, begun and held on the 13th day of April, A. D. 1897.

Present: Honorable William M. Springer, judge of said court.

On April 20th, 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER, Defendant; EVANS-SNYDER-BUEL COMPANY, Interpleaders. } No. 142.

On this day the plaintiffs file their answer to the interplea of the Evans-Snyder-Buell Company.

Said answer to interplea is in words and figures as follows, to wit:

In the United States Court, Northern District of the Indian Territory, at Tahlequah.

WM. MCFADDIN & SON
vs.
JAMES W. TAYLOR ET AL. } Answer to Interplea.

Now comes Wm. McFaddin & Son and for answer to the interplea of Evans, Snyder & Buel Company filed herein say:

That they deny that Evans, Snyder & Buel Company are the owners of or entitled to the possession of the cattle levied upon by the marshal under the writ of attachment in this cause and described in said interplea, but plaintiffs allege that said cattle were at the time of said levy the property of the defendant, J. R. Blocker, and that plaintiffs *is* entitled to the same under their attachment.

Wherefore plaintiffs ask that Evans, Snyder & Buel Company take nothing by their said interplea, and that the cattle levied upon be adjudged to plaintiffs to satisfy their debt and costs and for all proper relief.

R. A. GREER,
HUTCHINGS & ENGLISH,
THOMPSON & HASTINGS,
MAXEY & CLAYTON,
Att'ys for Plaintiffs.

5 Endorsed: "Filed in open court Apr. 20, 1897. James A. Winston, clerk."

Thereafterwards, to wit: and on the same day the following further proceedings were had in said cause, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER, Defendant; EVANS, SNYDER-BUEL COMPANY, Interpleaders.

Now on this day this cause comes on to be heard on the issues of the interplea of the Evans-Snyder-Buel Company; and the plaintiffs and the defendants appear by their attorneys and announce ready for trial; and thereupon come the following jury from the regular panel, to wit: Paul Rogers, John French, Ross Daniels, Thomas Rider, Frank Adair, Benjamin Goss, John Carlile, Rush Wilson, H. B. Smith, Tom Hayden, Frank Howard and Andy Aikin, who were tried, found qualified, chosen and sworn.

Thereafterwards, to wit: and on April 21, 1897, the same being one of the regular days of said term of said court, among the proceedings had were the following, to wit:

Wm. McFaddin & Son
vs.
J. R. Blocker, Defendant; Evans, Snyder-Buel Company, Interpleaders. } No. 142.

This cause this day coming on to be heard, both parties appearing by attorneys, answered ready for trial; and a jury of good and lawful men being duly empaneled and sworn to try the issues submitted to them in this cause, and said jury having heard the testimony, argument of counsel and charge of the court, returned the following verdict:

"We, the jury, find the issues of law and fact in favor of the interpleaders, Evans-Snyder-Buel Company.
(Signed) FRANK HOWARD, *Foreman.*"

It is therefore considered, ordered and adjudged that the interpleaders, Evans-Snyder-Buell Company, do have and recover of the plaintiffs, Wm. McFaddin & Son, and the defendant, J. R. Blocker, the property levied upon by virtue of the attachment in this cause, and described in the officer's return and the interplea herein, and all costs in this behalf expended, for which let execution issue.

Thereafterwards and on the same day, the following further proceedings were had, to wit:

Wm. McFaddin & Son
vs.
J. R. Blocker, Defendant; Evans-Snyder-Buell Company, Interpleaders. } No. 142.

6 And now comes plaintiffs, Wm. McFaddin & Son, and by their attorney file their motion for a new trial of this cause, and the court being well and sufficiently advised doth overrule said motion, to which ruling plaintiffs except, and their exceptions are now here noted of record.

Whereupon plaintiffs pray an appeal and the court doth grant said prayer; and it is ordered and adjudged by the court here that the plaintiffs be and they are hereby allowed an appeal from the judgment herein rendered at the present term of this court, to the United States court of appeals for Indian Territory, and that plaintiffs aforesaid be allowed thirty days in which to file their bill of exceptions.

Mandate of the Court of Appeals for the Indian Territory Reversing the Judgment of the Lower Court in said Cause.

UNITED STATES OF AMERICA, } *set:*
Indian Territory, }

No. 129.

In the Court of Appeals.

Be it remembered, that at a term of the court of appeals in the Indian Territory begun and held at the court-house in the city of South McAlester, on the third day, being the first Tuesday of January, A. D. 1899, amongst others, were the following proceedings, to wit:

On the 13th day of January, A. D. 1899, a day of said term:

WM. MCFADDIN & SON, Appellants,
vs.
J. R. BLOCKER ET AL., Defendants; EVANS, SNYDER-BUEL COMPANY, Interpleaders, Appellees.

Appeal from the Court of the Northern District of the Indian Territory.

This cause came on to be heard upon the transcript of the record of the court for the northern district of the Indian Territory, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said court for the northern district in this cause is this: The court below erred in holding the lien of the mortgages introduced in evidence superior to the attachment herein.

It is therefore considered by the court that the judgment of said court for the northern district in this cause rendered be, and the same is hereby for the error aforesaid, reversed, annulled, and set aside with costs; and that this cause be remanded to said
7 court for the northern district for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that said appellants recover of said appellees all their costs in this court in this cause expended, and have execution thereof

In testimony that the above is a true copy of the judgment of said court of appeals, rendered in the case therein stated, I, Wm. P. Freeman, clerk of said court of appeals, hereunto set my hand and affix the seal of said court of appeals, at my office in the city of South McAlester, this 13th day of February, A. D. 1899.

[SEAL.] (Signed) WM. P. FREEMAN, *Clerk.*

Said mandate being filed in this court at Tahlequah on the 23d day of February, 1899.

Thereafterwards, to wit, on the 10th day of April, 1899, the following proceedings were had:

Copy of Order of Court.

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

In the United States court in the Indian Territory, northern district, at a term thereof begun and held at Tahlequah, in the Indian Territory, on the 10th day of April, A. D. 1899.

Present: The Honorable John R. Thomas, judge of said court.

The following order was made and entered of record, to wit: On the 10th day of April, 1899, the same being a day of the regular April term, 1899, of said court, the following proceedings, among others, were had:

WM. MCFADDIN & SONS }
vs. } 142. Law.
J. R. BLOCKER ET ALS. }

Come now interpleaders herein and file their petition for change of venue; and, the court, being sufficiently advised, allows change of venue to Wagoner, Indian Territory. And it is ordered by the court that the clerk of this court transmit, without delay, to the clerk of this court at Wagoner, Indian Territory, all the papers in this case, together with a complete transcript of the proceedings had herein, there to be docketed for trial at the next term of said court.

8 And on the 12th day of April, 1899, the same being a day of said April term, 1899, of said court, among other proceedings, the following were had:

WM. MCFADDIN & SONS }
vs. } 142. Law.
J. R. BLOCKER ET ALS. }

It is ordered by the court that the mandate of the United States court of appeals for the Indian Territory, be spread of record, and said mandate is herein spread of record in the following words and figures, to wit:

No. 129. Form No. 5.

Be it remembered, that at a term of the court of appeals in the Indian Territory begun and held at the court-house in the city of South McAlester, on the third day, being the first Tuesday of January, A. D. 1899, amongst others, were the following proceedings, to wit:

On the 13th day of January, A. D. 1899, a day of said term:

WILLIAM MCFADDEN & SON, Appellants,
vs.
JOHN R. BLOCKER ET AL., Defendants; EVANS-SNYDER-BUELL, Interpleaders, Appellees.

Appeal from the Court of the Northern District of the Indian Territory.

This cause came on to be heard upon the transcript of the record of the court for the northern district of the Indian Territory, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said court for the northern district in this cause, is this: The court below erred in holding the lien of the mortgages introduced in evidence superior to the attachment herein.

It is therefore considered by the court that the judgment of said court for the northern district in this cause rendered be, and the same is hereby for the error aforesaid, reversed, annulled, and set aside with costs, and this cause be remanded to said court for the northern district for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that the said appellants recover of said appellees all their costs in this court in this cause expended, and have execution therefor.

In testimony that the above is a true copy of the judgment of said court of appeals, rendered in the case therein stated, I,
9 Wm. P. Freeman, clerk of said court of appeals, hereunto set my hand and affix the seal of said court of appeals, in the city of South McAlester, this 13th day of February, A. D. 1899.

WM. P. FREEMAN, *Clerk.*

Endorsed on the back: "Filed Feb. 23, 1899. Jas. A. Winston, clerk."

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, James A. Winston, clerk of the district court of the United States for the northern district of the Indian Territory, do hereby certify the foregoing to be a true copy of an order made by said court now on file in my office.

In testimony whereof I have hereunto set my hand, at my office in Tahlequah, in said district, this 29th day of April, A. D. 1899.

JAMES A. WINSTON, *Clerk,*
By H. W. C. SHELTON, *Deputy.*

Now on this 12th day of May, 1899, comes counsel for plaintiffs and suggests the death of the plaintiff William McFadden, and asks that this action as to him be revived in the name of his executors, William P. H. McFadden and James A. McFadden, which is allowed by the court, and said action revived accordingly, and said parties are made plaintiffs in this case, and counsel for plaintiffs in open court enter the appearance of said executors.

In the United States Court for the Northern District of the Indian Territory, Sitting at Wagoner, March Term, 1899.

WILLIAM MCFADDEN & SON, Plaintiffs,
vs.
JOHN R. BLOCKER ET AL., Defendants, with EVANS-SNYDER-BUEL COMPANY, Interpleaders. } No. 251.

Bill of Exceptions.

Be it remembered, that the above numbered and entitled cause being called for trial at the regular March term, A. D. 1899, of the United States court for the northern district of the Indian Territory, begun and held at the Federal court building, in the town of Wagoner, in said district and Territory, and on the 13th day of May, A. D. 1899, the same being one of the days of the said regular March, A. D. 1899, term of said court, William F. Hutchings, Maxey & Clayton, and R. A. Greer appeared as attorneys for the plaintiffs, and Charles B. Stuart, H. M. Pollard, Thomas Marcum, and S. S. Fears appeared as attorneys for the interpleaders, and the following proceedings were had in said cause, to wit:

Whereupon all parties announced ready and a jury of twelve good and lawful men was duly empaneled and sworn to try this cause, and all the witnesses both for plaintiffs and interpleaders were called and sworn and put under the rule.

And the plaintiffs herein having heretofore obtained judgment against defendants, it appears that the affirmative in this case is upon the interpleader-, and thereupon Charles B. Stuart, Esquire, made opening statements to the jury on the behalf of the interpleader-, and was following by Mr. W. T. Hutchings on behalf of the plaintiffs.

Whereupon the interpleader-, to sustain the issues on *its* part, offered evidence as follows, to wit:

Mr. POLLARD: We offer in evidence chattel mortgage dated April 23, 1896, from John R. Blocker to H. M. Pollard, trustee for Evans, Snyder-Buel Company, covering 6,250 head of cattle, together with the notes mentioned therein. Said mortgage was made on the 23d day of April, 1896, by Mr. Blocker, a resident of Bexar county, in the State of Texas, and it is to secure certain notes mentioned therein, aggregating $122,184.62, made on 6,250 head of cattle, which are a portion of those levied upon, the mortgage was recorded in Bexar county, Texas, on the 24th day of April, 1896, and in the northern district of the Indian Territory, at Muskogee, on the 27th day of April, 1896.

Mr. HUTCHINGS: Plaintiffs object to the introduction of this mortgage, because it shows on its face that it was given on cattle situated in the State of Texas; that it was recorded in the State of Texas, the recording acts of which State have no force or effect upon cattle in the Indian Territory, and cannot have any force or effect on cattle which were at that time in Texas, and afterwards transferred to the Indian Territory, where they were afterwards levied upon.

Secondly, because said mortgage was never filed or recorded in accordance with the laws in force in the Indian Territory.

Mr. POLLARD: I also desire, in this connection, to offer the notes mentioned in said mortgage. The first note is dated San Antonio, Texas, January 22, 1896, made by John R. Blocker to Evans-Snyder-Buel Company for $14,012.41.

Next note is made at San Antonio, Texas, February 6, 1896,
11 and is for $3,642.15, signed by John R. Blocker, and is due August 5, 1896.

They are the very identical notes that are mentioned and described in the mortgage offered in evidence; not the copies, but the originals

Mr. HUTCHINGS: The only objection is that they are secured by that mortgage.

The COURT: The objection to the introduction of the mortgage offered in evidence, and the notes mentioned therein, is overruled.

Mr. HUTCHINGS: To which ruling of the court in so overruling plaintiff's objection, the plaintiff then and there duly excepted and still excepts.

Which chattel mortgage above offered in evidence is in words and figures as follows, to wit:

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kansas City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar. }

Know all men by these presents: That I, John R. Blocker, of the county of Bexar and State of Texas, for and in consideration of the sum of one hundred and twenty-two thousand one hundred and eighty-four & $\frac{82}{100}$ dollars, to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed, have bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, the following-described property, to wit:

(6,250) sixty-two hundred and fifty head of cattle, 4,615 of them are three and four year old steers, and 1,635 of them are
12 cows, and branded as follows, to wit: 820 head of steers 78 left side, 1,653 head of steers left side, 922 head of steers O K on right side, 515 head of steers hip and side, 187 head of steers 77 left side, 320 head of steers left side, 198 head of steers

 left side, 205 head of cows H5 left side, 260 head of cows left side, 1,170 head of cows on left side.

Said above enumeration and description being intended to cover and include not only all the cattle owned by said mortgagor, as aforesaid, but all additions and accretions thereto are specifically included in and covered hereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in what are known as the McCaleb Pasture Co. pasture, and M. L. Minter's pasture, both from 2 to 15 miles south and west of the town of Muskogee and both in the Creek nation, Indian Territory.

Said cattle are all the cattle owned by said mortgagor in said pastures and they are all the cattle that are in said pastures having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

It is provided, however, that the above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to move said cattle or any part thereof, from the place where they are now located except as may be herein provided, or to otherwise dispose of, or incumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity of said note or notes the above-described cattle shall be shipped and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission in the usual and customary way, and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in payment of a sum equal to fifty
13 (50) cents for each and every head of said above-described cattle, and the further sum of $122,184.62 evidenced by my promis-ory notes described in substance as follows:

Description of Notes.

Date.	Maturity.	In favor of –	Where payable.	Rate of interest.	Am't.
1896.	1896.				
1-22-'96	7-21-'96	Evans-Snyder Buel Co.	Union stock yards, Ill.	10 p. c.	$14,012 41
2- 6-'96	8- 5-'96	" "	"	"	3,642 15
2-25-'96	8-24-'96	" "	"	"	14,758 06
3- 9-'96	9- 3-'96	" "	"	"	10,520 00
"	9-10-'96	" "	"	"	10,541 00
		National stock yards, Ill.			
"	9-17-'96	" "	"	"	10,563 00
"	9-24-'96	" "	"	"	10,585 00
"	10- 8-'96	" "	"	"	10,560 00
"	10-15-'96	" "	"	"	10,582 00
"	10-20-'96	" "	"	"	10,597 00
3-25-'96	8-25-'96	" "	"	"	5,223 00
"	9-30-'96	" "	"	"	5,278 00
"	10-28-'96	" "	"	"	5,323 00

All above notes are signed John R. Blocker, and one dated 2-25-'96 maturing 8-24-'96, for $14,758.06 is signed by Cornelia R. Blocker.

Together with any renewals or extensions of said note or notes or either of them, and the interest thereon, and such future advances as may be made by the said Evans-Snyder-Buel Co. to your said mortgagor.

Upon the payment of said promissory note or notes with interest thereon accrued and a sum equal to fifty (50) cents on each head of cattle together with the expenses incurred in executing the provisions of this mortgage being well and truly made, then this instrument is to be void; but in case of default in payment of said promissory note or notes, or either of them, at the maturity thereof, or the interest thereon, or the sum of fifty (50) cents per head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered, at the instance of the said Evans-Snyder-Buel Co. or the legal holder of said note or notes, to seize and to take into his possession all or any number or part of said cattle hereinabove described, and sell the same at public or private sale, as to said trustee may seem for the best interests of the parties hereto; said sale to
14 be for cash at such place as said trustee shall select. But if at public sale it shall be only after giving ten days' notice of the time and place of said sale, by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at place of sale; and for and in the name of the mortgagor to make and deliver to the purchaser or purchasers, all necessary bills of sale for the same, and to receive and receipt for the purchase-money thereof and apply the same to the payment of said promissory note or notes, and the interest thereon accrued, and fifty (50) cents per head commission, as aforesaid, on all of said cattle, and the

necessary expenses of said sale, and hold the remainder, if any, subject to the order of said mortgagor. It is further provides that, if the said mortgagor should attempt to move said property, or any part thereof, out of the way from the county or place in which the same is now located, or to sell, or to dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes, without the written permission of said Evans-Snyder-Buel Co., or the legal holder of said notes or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified; and it is further provides that in case said property, or any part thereof, should, at any time be seized, or about to be seized, by a third person under any process or claim whatever, then the said trustee shall be fully authorized and empowered to seize the said property, as aforesaid, and proceed to sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and if necessary, in order to get possession of said property from any person who may seize the same, the said trustee is fully authorized to institute any suit, or suits, either in his own name or the name of Evans-Snyder-Buel Co., or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property when sold.

Should any of the conditions of this instrument be broken, or violated, then at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable, instanter; or upon failure to pay said note or notes, or either of them at maturity, and the commission as herein provided, then in either event the whole of the above-described indebtedness shall become due and *ap*yable.

And in the event default is made in the payment of the note or notes hereinbefore mentioned, or either of them, at the maturity of same, or in the payment of any of the other obligations secured by this mortgage, whenever the same may become due, and the said note or notes, or either of them, or this mortgage is placed in the hands of an attorney for collection, or suit is brought thereon, upon a breach of any of the stipulations of the said note or notes, or mortgage, then and in either of these events, ten per cent. shall be added to the amount so, owing or due as attorneys' fees.

Provided, also, that in the option of the holders of the said note or notes or beneficiary under this mortgage said indebtedness secured by this mortgage*d* shall be payable at Fort Worth in Tarrant county, Texas; and in the event suit shall be brought on the said note or notes, or upon this mortgage, the same may, at the option of the beneficiary under this mortgage, or the holders of such indebtedness, be brought and maintained in any court having jurisdiction of the amount in controversy, in Tarrant county, State of Texas.

And in case *of* the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail or refuse to act, or perform, any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said

note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person, when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri, and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand this 23rd day of April, A. D. 1896.

J. R. BLOCKER. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered, that on this 23rd day of April, 1896, before me, B. F. Darlington, a notary public, duly commissioned, within and for said county and State personally appeared John R. Blocker, personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned and set forth, as his free act and deed.

In witness whereof I have hereunto set my hand and notarial seal this day and year last above written.

16 [SEAL.] B. F. DARLINGTON,
Notary Public, Bexar County, Texas.

My commission expires June 30th, 1897.

Sworn Statement.

STATE OF TEXAS, }
County of Bexar, } ss:

John R. Blocker, the mortgagor above mentioned, being sworn, says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are now in possession and under his control and are now located in the McCaleb Pasture Co.'s pasture and the M. L. Minter pasture both of which are 2 to 15 miles south and west of the town of Muskogee and in the Creek nation Indian Territory, and that the same are free from all claims or liens whatsoever, except what mortgages are held by H. M. Pollard, trustee, for Evans-Snyder-Buel Co. And that the said mortgagor is a resident of Bexar county, State of Texas.

JOHN R. BLOCKER.

Subscribed and sworn to before me this 23rd day of April, 1896.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30th, 1897.

Certificate of Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, } ss:
County of Bexar, }

I, Thad W. Smith, clerk of the county court, in and for said county, do hereby certify that the foregoing original chattel mortgage, from John R. Blocker to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original, and find the same to be a true and correct copy thereof, and in accordance with said law said copy was this day deposited, and was by me duly entered in the Register of Chattel Mortgages, volume 5, page 30.

In testimony whereof witness my hand and official seal at San Antonio, this 24th day of April, 1896.

[SEAL.] THAD W. SMITH,
Clerk County Court,
By JOHN STAPPENBECK, *Deputy.*

Attached to the above chattel mortgage is the following:

17 *Certificate of Record.*

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, James A. Winston, clerk of the United States court in the northern district, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 27th day of April, 1896, at 8 a. m., and duly recorded in Book E, pages 503 & '4.

Witness my hand and seal of said court at Muskogee, in said Territory, this the 28th day of April, A. D. 1896.

[SEAL.] JAMES A. WINSTON, *Clerk,*
By —— ——, *Deputy.*

(The above chattel mortgage is marked Exhibit "A.")

Mr. POLLARD: I now desire to offer in evidence chattel mortgage given by John R. Blocker to H. M. Pollard, trustee, for Evans-Snyder-Buel Co., dated May 19, 1896, and acknowledged by Blocker in Bexar county, and recorded in the office of the clerk of the United States court at Muskogee on the 23d day of May, 1896, covering 525 head of cattle, and made to secure three notes aggregating $9,844.60, and we offer in conjunction with that mortgage the original notes mentioned therein.

Mr. HUTCHINGS: Plaintiffs object to the introduction of this mortgage because it shows upon its face that the mortgagor was a resident of the State of Texas, and that the cattle were situated in the Creek nation, Indian Territory, and that the mortgagor was not only in possession of the cattle at the time, but that he was to contin-e to hold posses-

sion thereof until the happening of certain contingencies named in the mortgage, and that being a non-resident of the Indian Territory said mortgage could not be and was not recorded in accordance with the laws in force in said Territory.

The court overruled said objection to which plaintiff excepted.

Which said chattel mortgage above offered in evidence by the interpleader is in words and figures as follows, to wit:

18 Evans-Snyder Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Ad-ress us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents: That I, John R. Blocker of the county of Bexar, and the State of Texas, for and in consideration of the sum of ninety-eight hundred fourty-four and $\frac{60}{100}$ dollars to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purpose hereinafter expressed has bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust the following-described property, to wit:

(525) five hundred and twenty-five head of three and four year old steers, all branded NP or *N* on left side.

Said above enumeration and description being intended to cover and include, not only all the cattle owned by said mortgagor as aforesaid, but all additions and accretions thereto are specifically included in and covered thereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in what is known as the McCaleb Pasture Co.'s pasture located south and west of the town of Muskogee, and in the Creek nation, Indian Territory.

Said cattle are all the cattle owned by said mortgagor in said —— and they are all the cattle that are in said —— having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

19 It is provided, however, that the above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the

conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to remove said cattle or any part thereof from the place where they are now located, excepting as may be herein provided, or to otherwise dispose of, or encumber said property without the written permission of the holder of the note, or notes hereinafter mentioned, and at least three days before the maturity of said note or notes, the above-described cattle shall be shipped to and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill., Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in the payment of a sum equal to fifty (50) cents for each and every head of said above-described cattle; and the further sum of $9,844.15 evidenced by my promissory notes described in substance as follows:

Description of Notes.

Date.	Maturity.	In favor of—	Where payable.	Rate of int.	Am't.
1896.	1896.				
5- 6-'96	8-15-'96	Evans-Snyder Buel Co.	National stock yards, Ill.	10 p. c.	$3,087.47
5- 6-'96	9-15-'96	"	"	"	3,315.08
5-19-'96	10- 5-'96	"	"	"	3,641.60

Above notes signed by J. R. Blocker.

Together with any renewals or extensions of said note or notes, or either of the-, and the interest thereon, and such future advances as may be made by the said Evans-Snyder-Buel Co. to the said mortgagor.

Upon the payment of said promissory note or notes with interest thereon accrued and a sum equal to fifty (50) cents on each head of said cattle, together with the expenses incurred in executing the provisions of this mortgage being well and truly made, then this instrument is to become void, but in case of default in payment of said promissory note or notes or either of them, at the maturity thereof, or the interest thereon, or the sum of fifty (50) cents per head commission, as aforesaid, upon each and every head of cattle, the head trustee is then or at any time thereafter authorized and empowered at the instance of the said Evans-Snyder-Buel Co. or the legal holder of said note or notes, to seize and take into his possession, all or any number or part of said cattle hereinabove described, and sell
20 the same at public or private sale, as to said trustee may seem for the best interests of all parties hereto; said sale to be for cash at such place as said trustee shall elect. But if at public sale it shall only be after giving ten days' notice of the time and place of said sale by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and de-

liver to the purchaser, or purchasers, all necessary bills of sale, and to receive and receipt for the purchase-money thereof and apply the same to the payment of said promissory note or notes and the interest thereon accrued, and fifty (50) cents per head commission as aforesaid, on all of said cattle, and the necessary expenses of said sale, and hold the remainder if any, subject to the order of the mortgagor. It is further provided that, if the said mortgagor should attempt to move said property, or any part thereof, out of the way of the county or place in which the same is now located, or sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes without the written permission of the Evans-Snyder-Buel Co., or the legal holder of said not- or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified, and it is further provided that in case said property, or any part thereof, should, at any time be seized, by any third person, under any process, or claim whatever, then the said trustee shall be fully authorized and empowered to seize the said property, as aforesaid and proceed and sell the same as aforesaid, and apply the proceeds in the manner hereinabove specified, and, if necessary, in order to get possession of said property from any person who may seize the same, the said trustee is fully authorized to institute any suit or suits, either in his own name or in the name of Evans-Snyder-Buel Co. or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this intrument be broken or violated, then at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable, instanter, or upon failure to pay said note or notes, or either of them at maturity and the commission herein provided for, then, in either event the whole of the above-described indebtedness shall become due and payable.

And in the event default is made in the payment of the note or notes hereinbefore mentioned, or either of them at the maturity of the same or in the payment of any of the other obligations secured by this mortgage, whenever the same shall become due and
21 the said note or notes or either of them or this mortgage is placed *is placed* in the hands of an attorney for collection, or suit is brought thereon, upon the breach of any of the stipulations of the said note or notes or mortgage, then, and in either of these events, ten per cent. shall be added to the amount so owing or due as attorneys' fees.

Provided also, that at the options of the holders of the said note or notes as beneficiary under this mortgage, said indebtedness secured by this mortgage shall be payable at Fort Worth, in Tarrant county, Texas; and in the event suit shall be brought on said note or notes or upon this mortgage, the same may at the option, of the beneficiary under this mortgage or the holder of such indebtedness,

be brought and maintained in any court having jurisdiction of the amount in controversy, in Tarrant county, State of Texas.

And in the case the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail or refuse to act, or perform, any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri; and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand this 19th day of May, A. D. 1896.

J. R. BLOCKER. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered that on this 19th day of May, 1896, before me B. F. Darlington, a notary public, duly commissioned within and for said county and State personally appeared John R. Blocker personally well known to me to be the person described as the mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned and set forth as his free act and deed.

22 In witness whereof I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30, 1897.

Sworn Statement.

STATE OF TEXAS, }
County of Bexar, } ss:

J. R. Blocker, the mortgagor above mentioned, being sworn says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are now in possession and under his control and are now located in what is known as the McCaleb Pasture Co.'s pasture in the Creek nation, Indian Territory, and that the same are free from all claims and liens whatsoever.

And that said mortgagor is a resident of Bexar county, State of Texas.

J. R. BLOCKER.

Subscribed and sworn to before me this the 19th day of May, 1896.

B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30th, 1897.

Attached to the above chattel mortgage is written and printed the following:

Certificate of Record.

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, Jas. A. Winston, clerk of the United States court in the northern district, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 23d day of May, 1896, at 1 p. m., and duly recorded in Book E, page- 513 & '14.

Witness my hand and seal of said court at Muscogee in the said Territory, this 25th day of May, A. D. 1896.

JAS. A. WINSTON, *Clerk*,
By —— ——, *Deputy*.

(The above chattel mortgage is marked "Exhibit B.")

Mr. POLLARD: I now offer in evidence chattel mortgage from J. R. Blocker, to H. M. Pollard, trustee, for Evans-Snyder-Buel
23 Company, dated the 22nd day of January, 1896, covering 874 head of beef steers, being a portion of the cattle levied on in this case, the mortgage at the time describes the cattle as being in a pasture known as the Hirsh pasture, about eighteen miles east of the town of Encinal and in Encinal county, Texas, with the acknowledgement at the time, and showing that Mr. Blocker was at that time a resident of the State of Texas, and the county of Bexar, which mortgage was recorded in the county of Bexar, in the State of Texas on the 22nd day of January, 1896, and also in the county of Webb, in the State of Texas; together with the original notes mentioned therein, aggregating $14,012.41.

Mr. HUTCHINGS: Plaintiffs make the same objection to the introduction of this mortgage which was made to the introduction of the mortgage marked Exhibit A.

Which objection was by the court overruled, to which ruling of the court the plaintiffs duly excepted.

Which said mortgage introduced in evidence by the interpleader, is in words and figures as follow, to wit:

Original.

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents that I, John R. Blocker, of the county of Bexar, and State of Texas, for and in the consideration of the sum of fourteen thousand twelve and $\frac{41}{100}$ dollars to me paid by H. M. Pollard of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed, have bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee and his successors in this trust the following-described property, to wit:

(874) eight hundred and seventy-four head of beef steers,
24 three and four years old. Said steers are all branded 7S on left side.

Said above enumeration and description being intended to cover and include not only all the cattle owned by said mortgagor as aforesaid, but all additions and accretions thereto are specially included and covered hereby. The cattle above described may have other brands and marks on them than those mentioned above, but those given are the holding brands or marks, and carry the title to the cattle.

Now located in what is known as the Hirsh pasture, about eighteen miles east of the town of Encinal, and in Encinal county, Texas.

Said cattle are all the cattle owned by said mortgagor, in said county and adjoining counties and they are all the cattle there are in said counties having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust forever warrant and defend. It is provided, however, that the said above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to remove said cattle or any part thereof, from the place where they are now located, excepting as may herein be provided, or to otherwise dispose of, or encumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity

of said note or notes the above-described cattle shall be shipped to and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill., Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on a commission in the usual and customary way and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder Buel Co. in the payment of the sums equal to fifty (50) cents for each and every head of said above-described cattle, and the further sum of $14,012.41, evidenced by my promissory note, described in substance as follows:

25 *Description of Note.*

No.	Date.	Time of maturity.	In favor of—	Where payable.	Rate int.	Am't.
	Jan. 22, 1896	July 21, '96	Evans-Snyder Buel Co.	Union St. Yds., Chicago, Ill.	10 p.c	$14,012.41

Above-described note is signed by John R. Blocker.

The principal of the above note was advanced by said Evans-Snyder-Buel Co. at the special instance and request of said J. R. Blocker to take up his note due First National Bank of Eagle Pass, and secured by a lien on said before-described cattle, and it is understood said lien is carried forward herein.

Together with any renewals or extensions of said note or notes or either of the-, and the interest thereon.

Upon the payment of said promissory note or notes with interest thereon accrued, and a sum equal to fifty (50) cents on each head of said cattle, together with the expenses incurred in executing the provisions of this mortgage, being well and truly made, then this instrument is to become void, but in case of default of payment of said promissory note or notes, or either of the- at the maturity thereof, or the interest thereon or the sum of fifty cents (50) cents per head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered at the instance of the said Evans-Snyder-Buel Co., or the legal holder of the said note or notes to seize and to take into his possession all or any number or part of said cattle hereinabove described and sell the- at public or private sale as to the said trustee may seem for the best interests for the parties hereto, said sale to be for cash at such place as such trustee shall elect.

But if at public sale it shall be only after giving ten days' notice of the time and place of said place of sale by posting two written notices thereof, one at the court-house door of the county in which the said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and deliver to the pur-

chaser, or purchasers all necessary bills of sale for the same, and to receive and receipt for the purchase-money thereof, and apply the same to the payment of said promissory note or notes and the interest thereon accrued, and fifty — (50c.) per head, commission, as aforesaid, on all of said cattle, and the necessary expenses of said sale, and hold the remainder, if any subject to the order of said mortgagor. It is further provided that, if the said mortgagor should attempt to move said property or any part thereof out of the way from
26 the county or place in which the same is now located, or to sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of the note or notes, without the written permission of Evans-Snyder Buel Co. or the legal holder of said note or notes, then the said trustee, shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said notes be due or not, and apply the proceeds as above specified; and it is further provided that in case said property, or any part thereof, should at any time be seized, or about to be seized, by any third person, under any process or claim, whatever, then the said trustee shall be fully authorized and empowered to seize the said property as aforesaid, and proceed and sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and, if necessary, in order to get possession of said property from any person who may seize the same the said trustee is fully authorized to institute any suit or suits either in his own name or in the name of Evans-Snyder-Buel Co., or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this instrument be broken or violated, then, at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable instanter; or upon failure to pay said note or notes, or either of them at maturity, and the commission as herein provided, then, in either event, the whole of the above-described indebtedness shall become due and payable.

And in case of the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable or fail, or refuse to act, or to perform, any of the duties of the trust as herein provided then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument or by a separate instrument, and such person, when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard of the city of St. Louis, State of Missouri, and all the acts of the said trustee and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand, this 22nd day of January, A. D. 1896.

JOHN R. BLOCKER. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

27 *Acknowledgement.*

STATE OF TEXAS, } ss:
County of Bexar, }

Be it remembered, that on this 22nd day of January, 1896, before me, John A. Fraser, a notary public, duly commissioned, within and for the said county and State personally appeared John R. Blocker personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and considerations therein expressed, mentioned and set forth, as his free act and deed.

In witness whereof, I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] JOHN A. FRASER,
Notary Public, Bexar Co., Texas.

My commission expires June 1st, 1897.

Sworn Statement.

STATE OF TEXAS, } ss:
County of Bexar, }

John R. Blocker, the mortgagor above mentioned, being sworn, says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are free from all claims or liens whatsoever, and the said mortgagor is a resident of Bexar county, State of Texas.

JOHN R. BLOCKER.

Subscribed and sworn to before me this 22nd day of January, 1896.

[SEAL.] JOHN A. FRASER,
Notary Public, Bexar Co., Texas.

My commission expires June 1st, 1897.

STATE OF TEXAS, } ss:
County of Bexar, }

I, Thad W. Smith, county clerk of Bexar county, do hereby certify that a true copy of the above and foregoing chattel mortgage has this day been filed for registration in my office under the chattel-mortgage law, and as the same appears registered in Book, vol. 4, Register of Chattel Mortgages, of Bexar county, Texas.

Witness my hand and official seal at office in the *the* city of San Antonio, Texas, this 22nd day of January, 1896.

[SEAL.] THAD W. SMITH,
C. Ct'k, Bex. Co., Texas,
By JOHN STAPPENBECK, *Deputy.*

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Webb, } ss:

I, Geo. R. Page, clerk of the county court, in and for said county, do hereby certify that the foregoing original chattel mortgage, from John R. Block to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original, and find the same to be a true and correct copy thereof; and in accordance with said law said copy was this day deposited, and was by me duly entered in the Register of Chattel Mortgages, Encinal county, volume 1, page 28.

In testimony whereof, witness my hand and official seal, at Lando, Texas, this 24th day of January, 1896.

[SEAL.]

GEO. R. PAGE,
Clerk County Court,
By —— ——, *Deputy.*

(The above chattel mortgage is marked "Exhibit C.")

Mr. POLLARD: I will now offer in evidence mortgage from John R. Blocker to H. M. Pollard, trustee, for Evans-Snyder-Buel Co., dated February 6, 1896, covering 237 head of cattle, being a portion of those levied on in this case. The said mortgage was acknowledged and recorded in Bexar county, in the State of Texas, on the 6th day of February, 1896, and also in the county of Maverick, State of Texas, on the 8th day of February, 1896, and in connection therewith I desire to offer the notes mentioned in said mortgage, to secure which the same was given, and aggregating $3,642.15, the mortgage described the cattle as then being located in Maverick county, Texas.

Mr. HUTCHINGS: The plaintiffs offer the same — introduction of this mortgage which was offered to the introduction of Exhibit "A."

Objection overruled by the court, to which ruling the plaintiffs duly excepted.

Which chattel mortgage, above offered in evidence by the interpleader, is in words and figures as follows, to wit:

29 Original.

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kas. City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents: That I, John R. Blocker, of the county of Bexar, State of Texas, for and in the consideration of the sum of thirty-six hundred forty-two and $\frac{15}{100}$ dollars, to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed have bargained and sold, and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust the following-described property, to wit:

(237) four-year-old steers, branded 78 on left side, in various marks and other brands but the above is the holding brand, being the same cattle purchased by Evans-Snyder-Buel Co. from J. D. Sharp in Maverick county, on the 27th day of January, 1896, as shown by the bill of sale executed by said Sharp to said Evans-Snyder-Buel Co. and being said cattle rather steers conveyed to and by said Evans-Snyder-Buel Co. sold to John R. Blocker the considerations and payment of which is evidenced by the promissory note of said Blocker described herein.

Said above enumeration and description being intended to cover and include, not only all the cattle owned by said mortgagor, as aforesaid, but all additions and accretions thereto are specifically included in and covered thereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in W. P. Thompson pasture, Maverick county, Texas.

Said cattle are all the cattle owned by said mortgagor, in said county, and they are all the cattle there are in said county having on them the brands herein mentioned and described.

30 And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

It is provided, however, that the said above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed, but the mortgagor shall have no right to remove said cattle, or any part

thereof, from the place where they are now located, excepting as may herein be provided, or to otherwise dispose of, or to encumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity of said note or notes the above-described cattle shall be shipped and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission in the usual and customary way, and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty cents (50c.) per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in the payment of a sum equal to fifty — (50c.) for each and every head of said above-described cattle, and the further sum of $3,642.15 evidenced by my promis-ory notes described in substance as follows:

Description of Note.

No.	Date.	Time of maturity.	In favor of—	Where payable.	Rate of int.	Am't.
	Feb. 6th.	Aug. 5th.	Evans-Snyder Buel Co.	Union stock yards, Chicago, Illinois.	7	$3,642 15

Above-described notes signed by John R. Blocker.

Together with any renewals or extensions of said note or notes or either of them and the interest thereon.

Upon payment of said promissory note or notes with interest thereon accrued, and a sum equal to fifty cents (50c.) on each head of said cattle together with the expenses incurred in executing the provisions of this mortgage being well and truly made then this instrument is to become void, but in case of default in payment of said promissory note or notes, or either of them at maturity thereof, or the interest thereon, or the sum of fifty cents (50c.) per
31 head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered at the instance of the said Evans-Snyder-Buel Co., or the legal holder of said note or notes, to seize and take into his possession all or any number or part of said cattle hereinabove described, and sell the same at public or private sale, as to the said trustee may seem for the best interests of the parties hereto; said sale to be for cash at such place as such trustee shall elect. But if at public sale it shall be only after giving ten days' notice of the time and place of said sale by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and deliver to the purchaser, or purchasers all necessary bills of sale for the same, and to receive and

receipt for the purchase-money thereof, and apply the same to the payment of said promissory note or notes and the interest thereon accrued and fifty cents (50c.) per head commission as aforesaid on all said cattle, and the necessary expenses of sale, and hold the remainder if any, subject to the order of the mortgagor. It is further provided that, if the said mortgagor should attempt to move said property, or any part thereof out of the way from the county or place in which the same is now located, or to sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes, without the written permission of said Evans-Snyder-Buel Co., or the legal holder of said note or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified; and it is further provided that in case said property, or any part thereof, should at any time, be seized, or about to be seized, by any third person, under any process, or claim whatsoever, then the said trustee thall be fully authorized and empowered to seize the said property, as aforesaid, and proceed to sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and, if necessary, in order to get possession of said property, from any person who may seize the same, the said trustee is fully authorized to institute any suit, or suits, either in his own name or in the name of the Evans-Snyder-Buel Co., or the legal holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this instrument be broken or violated, then, at the option of the said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable instanter: or upon failure to pay said note or notes or either of them at maturity, and the commission herein provided, then in either event, the whole of the above indebtedness shall become due and payable.

32 And in case the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail, or refuse to act, or perform any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person, when so appointed shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri, and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof, I have hereunto set my hand this 6th day of February, A. D. 1896.

J. R. BLOCKER. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered, that on this 6th day of February, 1896, before me B. F. Darlington, a notary public duly commissioned within and for said county and State, personally appeared John R. Blocker, personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned, and set forth, as his free act and deed.

In witness whereof, I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Tex.

My commission expires June 1st, 1897.

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Bexar, } ss:

I, Thad W. Smith, clerk of the county court in and for said county, do hereby certify that the foregoing original chattel mortgage from J. R. Blocker to Evans-Snyder-Buel Co., together with a copy
33 thereof was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original and find the same to be a true and correct copy thereof and in accordance with said law said copy was this day deposited and was by me duly entered in the Register of Chattel Mortgages, volume No. 5, page 1.

In testimony whereof, witness my hand and official seal at San Antonio, this 6th day of February, 1896.

THAD W. SMITH,
[SEAL.] *Clerk County Court,*
By JOHN STAPPENBECK, *Deputy.*

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Maverick, } ss:

I, C. W. Hartup, clerk of the county court in and for said county, do hereby certify that the foregoing original chattel mortgage from J. R. Blocker to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original in accordance with law, and that I have carefully compared said copy with said original and find the same to be a true and correct copy thereof, and in accordance with said law said copy was this day de-

posited, and was by me duly entered in the Register of Chattel Mortgages, volume S, page 38.

In testimony whereof, witness my hand and official seal at Eagle Pass, Texas, this 8th day of Feb'y, 1896.

C. W. HARTUP,
[SEAL.] *Clerk County Court,*
By —— ——, *Deputy.*

(The above and foregoing chattel mortgage is marked Exhibit "D.")

The original notes mentioned in Exhibits A, B, C, D, which were introduced and considered read in evidence, are in words and figures as follows, to wit:

First Note Offered in Conjunction with Exhibit A.

Due July 21st, 1896. No. 13190.

No. —.

SAN ANTONIO, TEXAS, *Jan. 22nd*, 1896.

On July 21st, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. fourteen thousand twelve and $\frac{41}{100}$
34 dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity and until paid.

—— ——.

$14,012.41. Secured by
Due ——, —. 874 steers.
P. O., San Antonio, Texas.

Said note is signed by John R. Blocker, and across face of same is marked in large red letter- "Paid."

Second Note Offered in Conjunction with Exhibit "A."

Due August 5th, 1896. No. 13335.

No. —.

SAN ANTONIO, TEXAS, *Feb. 6th*, 1896.

On August 5th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-six hundred forty-two and $\frac{15}{100}$ dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,642.15. Secured by
Due Aug. 5th, '96. mortgage on 237 cattle.
P. O. San Antonio, Texas.

Said note signed by J. R. Blocker and across the face of the note written in large red letters is the word "Paid."

Next Note Offered in Evidence.

Due August 24th, 1896. No. 13413.

No. —.

SAN ANTONIO, TEXAS, *Feb. 25th*, 1896.

On August 24th, 1896, after date, we, or either of us, promise to pay to the order of Evans-Snyder-Buel Co. fourteen thousand seven hundred fifty-eight and $\frac{6}{100}$ dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

JOHN R. BLOCKER,
CORNELIA BLOCKER.

$14,758.06. Secured by
Due ——, —. mortgage on 3,000 cattle.
P. O. San Antonio, Texas.

Said note signed by John R. Blocker and Cornelia Blocker, and has written across its face in large red letters the word "Paid."

Next Note Offered in Evidence by Interpleader.

No. 277 (in pencil) C 1-2. 80612.

SAN ANTONIO, TEXAS, *M'ch 9th*, 1896.

September 3d, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hun-
35 dred twenty dollars for value received, negotiable and payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,520.00 Secured by
Due Sep. 3, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.
Said note is signed by J. R. Blocker.

Next Note Offered by Interpleader.

C 1-2, No. 278.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 10th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and forty-one dollars, for value received, negotiable and payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,541.00. Secured by
Due Sep. 10th, 1896. 9,000 cattle.
P. O. San Antonio, Tex. Mtge. Ind. Ter. & Tex.
Above note signed by J. R. Blocker, and there is written on the face of it in red ink the figures "80613."

Next Note by Interpleader.

No. 279, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 17th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and sixty-three dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,563.00. Secured by
Due Sep. 17th, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.
Above note signed by J. R. Blocker.

Next Order Offered by Interpleader.

No. 280, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 24th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and eighty-five dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum from maturity until paid.

J. R. BLOCKER.

$10,585.00. Secured by
Due Sep. 24th, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.

36 *Next Note Offered by Interpleader.*

No. 281, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 8th, 1896, after date I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred sixty dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER

$10,560.00. Secured by
Due Oct. 8th, 1896. 9,000 cattle.
P. O. San Antonio, Tex. Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 282, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 15th, 1896, after date I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and eighty-two

dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,582.00.	Secured by
Due Oct. 15th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 283, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 20th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and ninety-seven dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,597.00.	Secured by
Due Oct. 20th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 321, 126 d., 127.96.

SAN ANTONIO, TEXAS, *M'ch 25th*, 1896.

August 25th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-two hundred and twenty-two dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, until paid.

J. R. BLOCKER.

$5,223.00.	Secured by
Due Aug. 25th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. and Texas.

(In red ink:) Aug. 25. 4102.

37 *Next Note Offered in Evidence by Interpleader.*

No. 322.

SAN ANTONIO, TEXAS, *M'ch 25th*, 1896.

September 30th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-two hundred seventy-eight dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$5,278.00.	Secured by
Due Sep. 30th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Texas.

Next Note Offered in Evidence by Interpleader.

No. 323.

SAN ANTONIO, TEXAS, *M'ch* 25, 1896.

October 28th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-three hundred and twenty-three dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$5,323.00.	Secured by
Due Oct. 28th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Texas.

Next Note Offered in Evidence by Interpleader.

No. 329.

SAN ANTONIO, TEXAS, *May 6th*, 1896.

August 15th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty hundred and eighty-seven & $\frac{47}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum from maturity until paid.

J. R. BLOCKER.

$3,087.47.	Secured by
Due Aug. 15th, 1896.	400 steers, 4 yrs. old.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

Next Note Offered in Evidence by Interpleader.

No. 340.

SAN ANTONIO, TEXAS, *May 6th*, 1896.

September 15th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-one hundred and fifteen & $\frac{8}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,115.08.	Secured by
Sept. 15th, 1896.	400 steers, 4 yrs. old.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

38 *Next Note Offered in Evidence by Interpleader.*

No. 344.

SAN ANTONIO, TEXAS, *May 19th*, 1896.

On October 5th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-six hundred forty-one

& $\frac{60}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,641 60.	Secured by
Oct. —th, 1896.	525 cattle.
P. O. San Antonio, Texas.	Mtges. Ind. Ter.

Next Note Offered in Evidence by Interpleader.

No. 304.

SAN ANTONIO, TEXAS, *M'ch 10th*, 1896.

September 10th, 1896, after date, we, or either of us, promise to pay to the order of Evans-Snyder-Buel Co. thirty-seven hundred eighty-three & $\frac{70}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum from maturity until paid.

J. R. BLOCKER.
W. H. JENNINGS, JR.
B. F. DARLINGTON.
T. H. SHAW.

$3,783.70.	Secured by
Due Sep. 10th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

MR. STUART: We offer in evidence the writ of attachment in the case of McFadden & Son against Blocker, and the return on the writ, and the same is considered as read in evidence.

Which writ of attachment and the return thereon *is* marked Exhibit "E," and *is* in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Northern District.

WM. McFADDEN & SON, Plaintiffs,
vs.
JAMES W. TAYLOR ET AL., Defendants.

Order of Attachment with Summons.

The President of the United States of America to the marshal for the northern district, Indian Territory:

You are commanded to attach and safely keep the property of the defendants James W. Taylor, A. S. Lyons, E. T. Stephens, J. D. Reed & J. R. Blocker in your district, not exempt from
39 execution, or so much thereof as will satisfy the claim of Wm. McFadden & Son, the plaintiff- in this action for fifty-four thousand one hundred and forty $\frac{45}{100}$ ($54,140.45) dollars, and thirty dollars for the costs thereof; and you are also commanded to

summon the above-named defendants to answer on the first day after the next December term of the United States court in the Indian Territory, northern district, at Muskogee, I. T., being the 3rd day of December, A. D. 1896, a complaint filed against them in said court by the above-named plaintiffs, and warn them that upon their failure to answer, the complaint will be taken for confessed; and also to summon —— —— and such other persons as the plaintiff may suggest, as garnishees to answer in this action on said day at December term of said court.

Witness, the Honorable Wm. M. Springer, judge of said court, and the seal thereof, at Musogee, Indian Territory, this [SEAL.] 17th day of June, A. D. 1896.

JAS. A. WINSTON, *Clerk*,
By —— ——, *Deputy*.

Order of Attachment with Summons.

Marshal's return.

Received this order of attachment with summons, this 17th day of June, 1896, at 4.05 o'clock p. m. and served the same by levying upon the following-described property of the within-named defendant —— ——, to wit: On Monday, June 29th 1896, a large number of cattle as the property of J. R. Blocker, one of the defendants in this case, said cattle being held in the pasture controlled — M. L. Minter, and A. P. McKellop, and other pasture- near Summit, I. T., the number of which cattle was not known, they not having been counted, but which by agreement, signed by all the parties to this suit, said parties being plaintiffs, defendants and interpleaders, it was agreed that the number of said cattle and the brand which they were branded, should be as follows: 820 steers branded 78 on left side, 1,653 steers branded NP on left side, 922 steers branded O K on right side, 515 steers branded T5 on hip and side, 187 steers, branded 77 on left side, 320 steers branded T4 on left side, 198 steers branded T5 on left side; 525 3 & 4 year old steers branded NP or *N* on left side, 1,335 cows branded H5 or T4 or T5 on left side; said parties agreeing by said agreement, a copy of which is hereto attached and made a part of this return, to accept the number of the cattle mentioned above and the brands herein described as the actual number levied upon by the marshal; said agreement specially authorizing the marshal to make his appraisement according to the number and description of said cattle as given above. Pursuant to said agreement I appointed Thos. Johnson and W. R. Whitesides as appraisers who viewed and appraised said cattle at the sum of seventy-five thousand dollars, which appraisement is herewith returned and made a part of this return, said cattle being left in the hands of T. B. McDonald as custodian (?) for same.

On July 14th, 1896, Evans-Snyder-Buel Co. presented their bond as interpleader in this cause in the sum of one hundred and fifty thousand dollars, C. W. Turner, H. B. Spaulding, J. E. Turner,

Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider as sureties thereon, which said bond on same day was duly approved and the marshal directed to turn said catsle over to W. L. Darlington as agent for Evans-Snider-Buel Co., which was done, and said W. L. Darlington's receipt taken and herewith attached and made a part of this return.

S. M. RUTHERFORD,
U. S. Marshal,
By J. S. O'BRIAN, *Deputy.*

On the back of said order of attachment is stamped, written and printed the following, to wit:

Original.

WM. MCFADDEN & SON
vs.
JAS. W. TAYLOR ET AL. } No. 3043.

Order of Attachment.

Writ issued the 17th day of June, 1896.
Returnable the 3 day of December, 1896.
Filed Nov. 20, 1896.

JAS. A. WINSTON, *Clerk.*

Marshal's Fees.

Service	400
Summons appraisers	100
Miles	
Expense in lieu of milage	22315
Total	

Filed Apr. 6, 1897.

JAS. A. WINSTON, *Clerk.*
——— ———, *U. S. Marshal.*
——— ———, *Depety.*
MAXEY & CLAYTON ET AL.,
Attorneys for Plaintiff.

41 It is here agreed by and between counsel for the plaintiffs and interpleader that the property levied on is the same as that described in the mortgages introduced in evidence.

It is also agreed by and between counsel for the plaintiffs and the interpleader that the plaintiffs had actual notice of the mortgages at the time the levy was made. It is also agreed that the attaching creditor, McFadden, had actual notice of the existence of the mortgages introduced in evidence, and which were attempted to be recorded in the northern district of the Indian Territory at the time of the levy of his writ of attachment, and that the mortgages were examined by the counsel for plaintiffs in the attachment suit, and that the description of the property was taken from the same, and all this was before the attachment was issued.

Whereupon the interpleader called AMOS T. ATWATER, who, after being duly sworn as a witness in the case, on his oath testified as follows:

By Mr. STUART:

Question. Mr. Atwater, what is your full name?

Answer. Amos T. Atwater.

Q. Where do you reside?

A. St. Clair county, Ill.

Q. What relation, if any, do you bear to the Evans-Snider-Buel Company, the interpleaders in this suit.

A. Secretary of the company and manager of its St. Louis office.

Q. Please state whether or not your duties as secretary and manager involve and examination and consideration by you of money loaned or advanced in the Indian Territory during the years of 1894, 1895 and 1896?

A. They did.

Q. Do you remember the circumstance of certain money being advanced by the Evans-Snider-Buel Company to Blocker, and mortgages taken by it?

A. I do.

Q. How much money did Evans-Snider-Buel Company advance? Do you know about how —?

A. About $132,000.

Mr. HUTCHINGS: The question is objected to as irrelevant to the issues in this case.

Objection not ruled on.

Judge STUART:

Q. You say you remember of some mortgages being executed?

42 A. Yes, sir.

Q. Please look at these notes (handing witness notes which are set out in the evidence) and say if that is the indebtedness for which the mortgages were executed.

Mr. HUTCHINGS: Plaintiffs admit that fact.

Mr. STUART: Plaintiffs admit that the notes offered in evidence are the evidences of the indebtedness from J. R. Blocker to Evans-Snider-Buel Co., for which the mortgages introduced in evidence were executed to secure.

Mr. STUART:

Q. Mr. Atwater, please state to the court and jury whether, if you know as a matter of fact, whether it was Blocker's money that bought these cattle for which these mortgages were executed, or whether it was money of Evans-Snider-Buel Company.

Mr. HUTCHINGS: Plaintiffs object to the question because it is wholly irrelevant and immaterial to the issues in this case. We admit that the mortgages secured a valid debt, and do not attack it

in any way, and as for what the money was loaned for, or what went with it is wholly immaterial.

Which objection was by the court overruled; to which ruling the plaintiffs duly excepted.

Mr. STUART:

Q. Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advanced it?

A. Evans-Snider-Buel Company advanced the money.

Q. Did the Evans-Snider-Buel Company advance all the money that went into these cattle?

A. Yes, sir; all of it.

Q. Mr. Blocker advance any?

A. Not a dollar that I know of.

Q. Then I understand you, Mr. Atwater, to say that the property in question was purchased with money of Evans-Snider-Buel Company?

A. Yes, sir.

Q. At the time of the issuance of the writ of attachment in favor of McFadden, on the 17th day of June, 1897, was any portion of this mortgage indebtedness unpaid?

43 A. All unpaid.

Q. Do you know about what the aggregate amount of the unpaid indebtedness was?

A. About $132,000.

Q. Now, I understand you to say that that is the indebtedness covered by these mortgages?

A. Yes, sir.

Q. Do you know what the cattle were worth that were covered by the mortgages?

A. The debt represented the cost of the cattle.

Q. Do you know the actual value of the cattle, Mr. Atwater, at the time of the levy of the writ of attachment?

A. We considered them worth the amount of the debt.

Q. Do you know what the cattle sold for when they were placed on the market soon after the levy of the writ of attachment?

A. About a hundred thousand dollars.

Q. Is the debt now unpaid for which these mortgages were executed to you?

A. No, sir.

Q. How is it paid?

A. The debt is unpaid.

Q. Wholly unpaid?

A. Yes, sir, wholly unpaid.

Cross-examination.

Mr. HUTCHINGS:

Q. The cattle have all been sold?

A. Yes, sir.

Q. You mean that you have not applied the proceeds of the sale to Mr. Blocker's indebtedness?
A. Yes, sir.
Q. Do you know, Mr. Atwater, how many cattle Blocker at that time had in these pastures?
A. About 7,000 head.
Q. Do you know whether he had any more or not?
A. I do not.
Q. Do you know whether he had any other upon which your firm did not have mortgages?
A. I do not.
Q. You don't know as to that?
—. No, sir.

Witness excused.

Whereupon the interpleader called JOHN R. BLOCKER, who, after being duly sworn as a witness in the case, on his oath, testified as follows:

44 Mr. STUART:

Q. What is your name?
A. J. R. Blocker.
Q. Are you the J. R. Blocker who executed certain mortgages to Evans-Snyder-Buel Co.?
A. Yes, sir.
Q. I mean the mortgages that have *have* been introduced in evidence in this case?
A. Yes, sir.
Q. Where were those mortgages executed?
A. San Antonio, Texas.
Q. Do you remember where the property was located upon which these mortgages were executed?

Mr. HUTCHINGS: The mortgages speaks for themselves.
Mr. STUART: All I want to prove is that the property in controversy and secured by the mortgages was in the Indian Territory.
It is here admitted by the counsel for the respective parties, that the cattle mentioned in the first two mortgages read in evidence, being Exhibit A and B, were in the Indian Territory, and in the northern judicial district at the time of the execution of the mortgages, and that the cattle mentioned in the mortgages put in evidence as Exhibits C — D, were in Texas at the time of the execution of those mortgages—at the time of the execution and registration of those mortgages.

Mr. STUART:

Q. Mr. Blocker, of what State were you a citizen at the time you executed these mortgages, and at the time the same were recorded in the northern district of the Indian Territory?
A. The State of Texas.

Q. And a resident of the State?
A. Yes, sir.
Q. I understand you to say that the cattle upon which the two first mortgages were executed were in the Indian Territory at the time you executed the mortgages?
A. Yes, sir.
Q. And in the northern district?
A. Yes, sir.
Q. Please state whether or not the cattle which were seized were the same cattle which were covered by the mortgages?
A. Yes, sir.
45 Q. The four mortgages introduced in evidence?
A. Yes, sir.

Cross-examination.

Mr. HUTCHINGS:

Q. Mr. Blocker, did those mortgages cover all the cattle you had in that pasture, the McKellop pasture, and all those pastures down there mentioned in the mortgages?
A. Yes, sir.
Q. Did a man by the name of Jennings have some cattle in one of the same pastures in which those were?
A. Yes, sir.
Q. You interested with him?
A. No.
Q. Did Mr. Coleman likewise have some cattle in the pasture in which you had those?
A. No, sir.
Q. Were you interested with Mr. Coleman in some cattle?
A. No, sir.
Q. How much of your money own did you put into those cattle?
A. Not a dollar.
Q. You had been pretty successful with cattle the year before?
A. Yes, sir.
Q. What had you done with your money then?
A. Paid debts with it.
Q. You been doing that right along?
A. Yes, sir.

Witness excused.
The interpleader, who is the plaintiff in this case, rests.

Mr. HUTCHINGS: We now renew our objection to the evidence offered to show that the money which was represented by these notes, and loaned to Mr. Blocker, was invested in the cattle upon which the mortgages *was* given, and that said money represented by those notes was the purchase price of said cattle, and ask that all evidence pertaining to this matter be withdrawn from the consideration of the jury.

The court overruled said objection, to which ruling of the court the plaintiffs, McFadeen & Son, duly excepted.

Mr. HUTCHINGS: We now offer in evidence the record of the judgment in the case of Wm. McFadden & Son against Blocker,
46 and the record sustaining the attachment of the same. The same being introduced is considered read.

Which record of judgment, above offered in evidence, is marked Exhibit "E," and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

United States Court, Indian Territory, Northern District.

At a stated term of the United States court, in the Indian Territory, northern district, begun and had in the court-rooms at Muscogee, in the Indian Territory, on the first day of Dec., in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America one hundred and twenty-one, 121.

Present, the Hon. William M. Springer, judge of said court.

On the 27th day of January, 1897, being a day of the regular Dec. term, 1896, among the proceedings had were the following, to wit:

WM. MCFADDEN & SON
vs.
J. R. BLOCKER ET AL.

Interplea of Evans-Snyder-Buel Co. Filed.

And on the 29th day of January, 1897, the same being a regular day of the said term of said court, the following proceedings were had, to wit:

WM. MCFADDEN & SON, Plaintiffs,
vs.
J. R. BLOCKER, Defendant. } No. 3043.

Now on this day this cause coming on to be heard upon the complaint of the plaintiffs, and it appearing to the court that the defendant J. R. Blocker had been duly served with process in this cause as the law directs and he having failed to plead, answer or demur to plaintiffs' cause of action, and no one appearing for him he is considered in default; and it further appearing to the court that at the commencement of this action there was an attachment sued out against the defendant on the grounds that he was a non-resident of the Indian Territory, and said defendant, J. R. Blocker, having failed to answer or controvert the grounds of said attachment, and made no defense herein either as to the debt or as to the grounds of the attachment and it appearing to the court from a transcript of a judgment attached to plaintiffs' complaint which was recovered against the defendant, J. R. Blocker, on the 26th day of May,
47 1887, in the district court of Jefferson county, Texas, that said defendant, J. R. Blocker, is indebted to the plaintiffs upon said judgment in the sum of fifty-five thousand eight hundred and

seventy-five and seventy-one one-hundredths ($55,875.71) dollars, and that no part of said judgment has been paid:

It is therefore considered, ordered and adjudged that the plaintiffs, Wm. McFadden and W. P. McFadden, copartners, doing business under the firm name and style of William McFadden & Son, have and recover of and from the defendant, J. R. Blocker, the sum of $55,875.71 and the costs of this suit together with ten per cent. interest thereon from this date, for which let execution issue.

And it is further considered, ordered and adjudged by the court that the attachment sued out by the plaintiffs against the defendant, J. R. Blocker at the commencement of this suit be and the same is sustained hereby.

And it appearing to the court that the Evans-Snyder-Buel Co. have interplead in this cause, claiming the property levied on under the writ of attachment sued out by the plaintiffs and levied upon as the property of J. R. Blocker and that said interplea is yet undisposed of and waiting trial thereon and the plaintiffs having filed their application in due form for a change of venue of this cause to one of the other places of holding court in the northern district, said cause is hereby transferred to Tahlequah, one of the places of holding court in the said district and plaintiffs are given until the first day of next term of court to be held at Tahlequah, to plead, answer or demur to said interplea.

The defendant in the trial of the issues of the interplea here rests its case.

(This is all the evidence given in the trial.)

Mr. STUART: Now at the close of all the evidence in the case, the plaintiffs in the interplea, ask the court to instruct the jury to return a verdict in this case for the interpleader, Evans-Snyder-Buel Co.

Mr. HUTCHINGS: Now at the close of the testimony in this case the plaintiffs moves the court to instruct the jury to return a verdict for the plaintiffs in the original suit, and the defendants, in the interplea, and that it appearing in the evidence that the cattle for which the interpleader gave its bond have been sold, and that they were in value largely in excess of the debt of the defendant that they find, not only that the property at the time of the
48 levy was the property of J. R. Blocker, but find in favor of the plaintiffs in the original suit the amount of their judgment and interest to date.

Which motion of said defendants in the interplea, Wm. McFadden & Son, the court overruled, to which said ruling the defandants, Wm. McFadden & Son duly excepted.

Whereupon the court sustained the motion of the interpleader, the Evans-Snider-Buel Co., to direct the jury to return a verdict in its favor, and instructed the jury to return a verdict for the interpleader, Evans-Snider-Buel Co. To which ruling of the court the defendants in the interplea, Wm. McFadden & Son duly excepted at the time, and still except.

Mr. STUART: We will agree in this case—

It is agreed by the attorneys for the intervenor, in open court, that in case the judgment in this court shall be in favor of the intervenors and against the plaintiffs, McFaddins, that if the court of appeals for the Indian Territory shall reverse said judgment, that it may, at the same time, render judgment in favor of the plaintiffs, McFaddins, for the amount of plaintiffs' demand, as shown by the judgment in this case, and for costs.

This agreement is made with the understanding that it shall not operate to our prejudice in case we should desire to appeal from that judgment.

Mr. HUTCHINGS: It is agreed by counsel for plaintiffs that they shall not be prejudiced in their right to appeal to any court that shall have jurisdiction of such appeal.

Whereupon the jury returned the following verdict, to wit:

McFADDEN
vs.
J. R. BLOCKER; EVANS-SNYDER-BUEL Co., Interpleaders.

"We the jury do find from the law and the evidence the issues herein involved in favor of the interpleaders, Evans-Snider-Buel Co., and against the plaintiffs.

JOHN DUPONT, *Foreman.*"

And thereafter, to wit, on the same day the defendants in the interplea, Wm. McFadden & Son, filed *its* motion for a new trial, which said motion is in words and figures as follows, to wit:

49 In the United States Court for the Indian Territory, Northern District, Sitting at Wagoner.

W. P. H. McFADDIN and W. P. H. McFADDIN & J. A. McFADDIN, Ex'ors of Wm. McFaddin, Plaintiffs,
vs.
J. R. BLOCKER ET ALS., Def't-, and EVANS-SNIDER-BUEL Co., Interpleaders.

Comes now the plaintiffs and move the court to set aside the verdict and grant a new trial on the issues of the interplea and for grounds therefor says:

1st. That the court erred in directing a verdict in favor of the interpleader.

2nd. That the verdict of the jury is contrary to law.

3rd. That the court erred in overruling the objections to the introduction in evidence of Exhibits A, B, C, & D, and the statements of the witness Atwater that the money loaned and secured by the mortgages was the purchase-money of the cattle levied on.

R. E. GREER,
WILLIAM T. HUTCHINGS,
MAXEY & CLAYTON,
Att'ys for Plaintiffs.

Which motion being overruled by the court, the plaintiffs at the time duly excepted.

It is therefore considered, ordered and adjudged that the interpleaders, Evans-Snider-Buell Company, do have and recover of the plaintiffs, individually, W. P. H. McFaddin, and W. P. H. McFaddin and J. A. McFaddin, executors of the estate of Wm. McFaddin, deceased, and the defendant J. R. Blocker, the property levied upon by virtue of the attachment in this cause, and described in the officer's return and the interplea herein, and all costs in this behalf expended, for which let execution issue.

Whereupon the defendants in the interplea pray and appeal and the court doth grant said prayer; and it is ordered and adjudged by the court here that the desendants in the interplea, W. P. H. McFaddin *et al.*, be and they are hereby allowed to appeal from the judgment herein rendered at the present term of this court, to the United States court of appeals for the Indian Territory.

Wherefore plaintiffs pray that this their bill of exceptions
50 be signed, sealed and made a part of the record in this case, which is accordingly done.

This 17th day of May, 1899.

WM. M. SPRINGER,
Judge United States Court, Northern District, Ind. Ter.

O K.

S. S. FEARS,
Attorneys for Interpleader.

Bill of exceptions endorsed: "Filed May 17, 1899. Jas. A. Winston, clerk."

UNITED STATES OF AMERICA, }
Indian Territory, Northern Judicial District, } *ss:*

I, James A. Winston, clerk of the United States court in the Indian Territory, in and for the northern district thereof, do hereby certify that the within and foregoing transcript is a full, true and correct transcript of the record and proceedings, and all things, as far as called for, concerning the cause numbered 251, and entitled Wm. McFaddin & Son, plaintiffs, and J. R. Blocker *et al.*, defendants, and Evans-Snider-Buel Company, interpleaders, as the same appears to me from the records and files of my office at Wagoner.

Witness my hand and the seal of said United States court, on this the 20th day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

JAS. A. WINSTON, *Clerk.*

United States Court, Northern District, Muscogee,
in the Indian Territory.

51 *Appendix.*

In the United States Court for the Indian Territory, Northern District, at Wagoner, Ind. Ty., May 13, 1899.

W. P. H. McFADDIN ET AL.
vs.
J. R. BLOCKER ET AL., Def'ts; EVANS-SNIDER-BUEL CO., Interpleader. } No. 251.

Opinion of the Court.

William M. Springer, judge, presiding.

If the questions presented in this court at this time were the same as those presented when this case was tried at Tahlequah my duty would be clear and free from any embarrassment whatever. I believe that it is the duty of the trial court to respect and carry out the opinions of the court of appeals, or the higher courts in a case at bar, and in all cases where the questions presented are similar, to observe that rule unhesitatingly.

As to the validity of the act of Congress, approved Feb. 3, 1897, entitled "An act relating to mortgages in the Indian Territory," I entertain the same view that I expressed when this case was tried at Tahlequah, but the court of appeals, on this question, has overruled that opinion, and if that were the turning point this time, as it was the turning point then, in my judgment, I should bow with deference to the superior court and sustain the contention, that this law was not retroactive and did not validate the mortgages in question. I say that I should feel it my duty to do that, altho' my mind has not changed in the least.

If now I should direct the jury to return a verdict for the plaintiffs, McFaddin & Sons, and against the interpleader it might, with propriety, be said in the court of appeals when this case comes up for argument, that the trial court had heard the contention of the counsel for the interpleader in this case, and had overruled that contention as presented in this trial. This argument was not presented or suggested at that time; nor did it occur to Judge Clayton. I am satisfied of this, because I have discussed the matter with him frequently, and I believe now, as firmly as I believe anything that exists of which I have knowledge, that if Judge Clayton's attention had been called, at the time, to this opinion, in which he
52 stated that non-resident mortgages were proscribed by this act, that he would have seen at once that such a proscription was in violation of the Constitution of the United States.

There can be no greater privilege in this western country than the right to borrow money and use that money to buy cattle and bring them into the Indian Territory, and in these Western States, and pasture them until they are ready for the market. Hundreds and thousands of men are engaged in that business, and vast fortunes have been built up in it.

As far as Blocker is concerned, it is my opinion that under section 2, article 4, of the Constitution of the United States, the same privilege that Congress grants a resident of the Indian Territory, the Constitution confers upon the residents or citizens of the States, and that doctrine is well established and recognized in all the States of the Union. If Judge Clayton's attention had been called to this I am certain he would have said, in regard to the Arkansas law, in so far as it makes a discrimination, it is void, because he is a loyal citizen of this country, and believes in the Constitution of the United States, and would go as far to uphold it, when his attention is called to it, as any other judge of the United States.

The case as now presented to this court differs so materially from the case which was presented to the court of appeals, and the argument at this time raises such new and important questions that it cannot be said that the doctrine of *stare decisis* applies. As stated in Sutherland on Stat. Const., sec. 316:

"No absolute rule can be given as to when *stare decisis* is imperative, so much depends on the particular case in which it may be invoked. For, it must be confessed, that hasty and ill-considered decisions are sometimes made, and even of such nature to become rules of property; decisions so obviously against law that they ought, in vindication of the law, to be overruled, and in a multitude of instances have been." (See Chestnut *v.* Shane, 16 Ohio, 599, and other cases cited in note to said section.) In concluding the section the author states:

"This rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled."

In section 317 Mr. Sutherland says:

"The two grounds of justification in departing from even a single decision which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing further
53 injustice; (2) the necessity of vindicating clear and obvious principles of law."

These authorities seem to me, not only to authorize, but require this court to disregard the decision of the United States court of appeals for the Indian Territory in this case; believing as I do, as the case is now presented to this court, and as it will be presented again to the court of appeals, that the opinion which the court will now submit will be concurred in by the entire court. In this opinion handed down by the court of appeals for the Indian Territory there are certain propositions laid down to which I desire to call attention at this time. On page 1045 of volume 48 of S. W. Reporter, Mr. Justice Clayton, speaking for the court, said:

"One of the contentions of the learned counsel for the interpleader, in their brief, is that, inasmuch as there was no statute here providing for the recording of mortgages executed by non-resident mortgagors, the common law would prevail as to them. There are two answers fatal to this contention: First, Congress having enacted a statute relating to the recording of these instruments of writing, and having omitted to provide for the recording of such mortgages,

the maxim, '*Expressio unius est exclusio alterius*,' will prevail. And, second, at common law a mortgage valid against creditors could only be made by a delivery of the property. It was essential that the custody and possession of the property should be delivered to and retained by the mortgagee. The intent of the statute providing for the recording of mortgages of personal property was to do away with the necessity of any delivery of the property, and to enable mortgagors to hold possession until default. For this purpose registration is required, as giving, perhaps, even greater notoriety to the transaction than delivery and retention of possession. Registration thus becomes a substitute as well for delivery as for retaining possession of the property. Jones Chat. Morg. No. 176. No delivery of the property having been made to the mortgagee in this case, and the possession thereof having been retained by the mortgagor, it is evident that the mortgagee, the interpleader, is in no better condition by considering his mortgage as at common law. Under the statute he is simply the holder of an unrecorded mortgage. At common law he is the holder of a mortgage without delivery of possession of the mortgaged property. The one is the equivalent of the other. As against creditors in either case, they are fraudulent and void."

Quoting further from that opinion on page 1047, referring to the mortgage law of the State of Arkansas, section 4742 of Mansfield's Digest, as put in force in the Indian Territory, Judge Clayton said:

"This statute has been the law of Arkansas from the time
54 it was admitted as a State of the Union. As evidenced by that act, for more than half a century the policy of that State has been to forbid the record of mortgages executed by non-resident mortgagors. They were a proscribed class, who, at least as against third persons, could only create a lien on personal property by turning over possession to the mortgagee; and when that statute, by act of Congress of May 2, 1890, was extended over this Territory, it came to us granting the same rights, enjoining the same restrictions, enforcing the same policy, and subject to the same constructions, as in the State from which it came."

"The act of Congress of February 3, 1897, evidenced a change of policy of the Government. A non-resident mortgagor was taken from the proscribed class, a new right was given to him, and, if the latter clause of this act is to be construed as retroactive, it was not to cure a pre-existing defect, either of law or of fact, because, under the law as it then stood and the facts of this case, no defect existed, but it was intended, after conferring the new right, that the benefits to be derived from it should be extended to cover past acts and transactions which at the time they were performed, were against public policy and forbidden by law."

Special reference is directed to the following propositions stated in the above extracts. First, that at common law, a chattel mortgage to be valid against creditors could only be made by delivery of the property, and, secondly, that under the mortgage law of Arkansas, put in force in the Indian Territory, non-resident mortgagors were a proscribed class, and that they could only create a lien upon their

personal property by turning over the possession to the mortgagee, and that by the curative act of February 3, 1897, the non-resident mortgagor was taken from the proscribed class and a new right was given to him by this act of Congress.

As to the first proposition stated above, that at common law a chattel mortgage, to be valid against creditors, could only be made by a delivery of the property to the mortgagee, and a retention by him of the property. The opinion of the court of appeals, as shown by the above extracts, was to the effect that, the interpleader in this case was in no better condition by having his mortgage than he would have been at common law. As stated by the court, under the statute he was simply the holder of an unrecorded mortgage, and at common law mortgages of personal property without delivery or possession of the mortgaged property, and as against creditors in either case, the opinion states "were fraudulent and void."

Especial attention is called to chapter 5 in Bump on Fraudulent Conveyances, beginning at page 61 and ending with page 131. In this chapter the learned author has exhaustively considered
55 the authorities upon this subject, both English and American, and states his conclusion to be that the preponderance of the authorities is at the present time in favor of the doctrine, that possession of personal property by a vendor, after sale, is only *prima facie* evidence of fraud. On pages 74 and 75, of Bump on Fraudulent Conveyances, the rule is stated as follows:

"The doctrine that the retention of possession will, under all circumstances, render a transfer of personal property fraudulent and void has not been laid down by any court, nor adopted anywhere. There are admitted exceptions to the rule, varying in number and character according to the strictness with which the rule is administered. But evidence is either *prima facie* or conclusive. If evidence is liable to be contradicted or explained it is only *prima facie*, but conclusive evidence cannot be contradicted."

Concluding this paragraph the author states:

"It follows, then, that in every case the vendee may, if he can, show by evidence special reasons to take his case out of the general rule. The fact of possession in the vendor, as it may be explained, is, therefore, not conclusive, but only *prima facie* evidence of fraud." (See also Hall *v.* Tuttle, 8 Wend., 375.)

In a note on page 130 of Bump on Fraudulent Conveyances, is this statement:

"The doctrine in the text is laid down according to the principles of the common law, but these, of course, are liable to modification by the statutes, of the various States."

The note further says:

"These acts of the several States commonly relate to bills of sale and mortgages of personal property, and are designed to prevent the mischiefs that may arise from secret sales, and hence require that such transfers shall be recorded in all cases where the grantor retains the possession."

A list of the States having such statutes is set forth in the note, and the peculiarities of some of the statutes.

Any person who will read this chapter from Bump on Fraudulent Conveyances will be forced to the conclusion that the preponderance of authorities, as stated by Mr. Bump, at the present time, is in favor of the doctrine that possession of personal property by the mortgagor, after sale, is only *prima facie* evidence of fraud, and that this presumption may be rebutted, and when rebutted the sale is valid, although possession is retained by the vendor.

56 In the case at bar, under the evidence as presented on this trial it is shown conclusively, and even admitted by counsel for plaintiffs, that the transaction between the interpleader and Blocker was free from even the suspicion of fraud, and by the evidence it is shown that the intervenor furnished Blocker with the money, secured by the notes and mortgages in question, with which the cattle seized by the attachment of the plaintiffs were purchased, that it was money borrowed from the intervenor, and that the mortgages in question were given by Blocker to secure the money thus advanced, and with which the cattle in question were purchased in the State of Texas.

We are not left in doubt as to the doctrine on this subject which prevails in this jurisdiction. In the case of Pyeatt *et al. vs.* Powell, decided by the circuit court of appeals for the eighth circuit at St. Louis, July 25, 1892, reported in vol. 2, C. C. A. page 367, Mr. Justice Sanborn, speaking for the entire court, said:

"The rule of the common law is that a mortgage of personal property, unaccompanied with possession, is *prima facie* void as to creditors of the mortgagor; yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession." Citing Ryall *v.* Rolle, 1 Atk., 165, 168; Alton *vs.* Harrison, L. R. 4 Ch. App., 622, 626; Martindale *v.* Booth, 3 Bunn & Adol., 498, 506; Hauselt *v.* Harrison, 105 U. S., 401; Warner *v.* Norton, 20 How., 448, 460; Martin *v.* Ogden, 41 Ark., 191, 192; 2 Kent, Comm., 521.

The Pyeatt case arose in the Indian Territory, and was taken on appeal to the circuit court of appeals for the eighth circuit from the United States court in the Indian Territory, before the establishment of the court of appeals in this Territory. The case arose in 1889, and was decided prior to the passage of the act of May 2, 1890, which extended the mortgage laws of Arkansas over the Indian Territory. There was at that time no law in the Indian Territory fixing a place for the recording of mortgages of any kind. Referring to this fact the circuit court of appeals in that opinion stated as follows:

"What was the law in the Indian Territory on this subject in 1888 and 1889? Prior to the passage of the act of Congress of May 2, 1890 (26 U. S. St., p. 24), extending over this Territory certain statutes of the State of Arkansas, there was no statute in operation in this Territory upon any subject outside of those treated in the acts of the Congress regulating intercourse with the Indians and punishing offenses against the United States. In the United States,

in the absence of statutes, the presumption of the existence of
57 the common law prevails in all the territory of the original colonies, and in all newly acquired territory originally settled by Englishmen or their American descendants; but this presumption may not prevail in the Indian Territory, because, before its purchase by the United States, it was a part of a territory settled by the subjects and governed by the laws of other nations."

The court stated further:

"There is, however, another well-settled principle, found in reason and authority, upon which, in the Federal courts, the common law must be held to govern the rights of these parties. It is that the *lex fori*, or, in other words, the laws of the country to whose courts the party appeals for redress, furnish in all cases, *prima facie*, the rule of decision. Monroe *v.* Douglas, 5 N. Y., 452; the Scotland, 105 U.S., 24, 30, 31; Garner *v.* Wright, 52 Ark., 388; 12 S. W. Rep.; Norris *v.* Harris, 15 Cal., 254. In the Federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action; and when by the act of March 1, 1889, (25 U. S. St., p. 783,) the Congress, with the assent of the Indians, created the court below for the Indian Territory, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory, and any citizen of or persons residing or found in the Indian Territory, when the amount in controversy was $100 or over, we hold that it gave that court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was thus given jurisdiction, where, as in this case, no proof is made of the laws, rules or customs obtaining in that Territory."

In the Pycatt case, *supra*, decided by the circuit court of appeals for the eighth circuit, the court below instructed the jury that the possession of the property by the mortgagor was not inconsistent with the terms of the mortgage, and that if the jury believed from the evidence that McClelland was justly indebted to Powell in the sum of money for which the two notes read in evidence were executed, and that the mortgage was given in good faith to secure the payment of the said notes, and that the plaintiff had actual knowledge and knew of said mortgage before bringing their suit and obtaining their judgment against the mortgagor, McClelland, then the mortgaged property should not be held subject to their execution, and the jury should find for the plaintiff, Powell.

The other instructions were in accordance with this doctrine.
58 The appellants in that case insisted that these instructions were erroneous, but the circuit court of appeals overruled their contention and held that no error had been committed by the trial court in the Indian Territory. The court further held, after reviewing these contentions, as follows:

"It is clear that under this evidence and these concessions there was no question about the validity of the debt, or the fraudulent character of the mortgage as to creditors, to be submitted to the jury, and hence there could have been no prejudicial error in the instruc-

tions we have been considering. A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor;" and further that court held:

"It is true that it was not material whether the defendants were or were not notified of this mortgage after their debt accrued and before they brought suit; but the charge of the court that this mortgage entitled the plaintiff to recover, if defendants were notified of it before suit, could do the defendants no injury, because, under the admissions as to its character, the mortgage entitled him to recover whether the defendants were notified of it or not."

In view of this opinion of the circuit court of appeals for the eight circuit, an opinion which is binding upon this court, in so far as it is applicable to any case pending in this court, the statement in the opinion of the court of appeals for the Indian Territory, that the interpleader in the case at bar was simply the holder of an unrecorded mortgage, and at common law a mortgage, without delivery of possession of the mortgage property, was fraudulent and void, is untenable and the error committed by our court of appeals is so patent that upon a review of this case there can scarcely be a doubt that the court will reverse the opinion which was handed down in this case. Conceding, as held by our court of appeals, that the intervenor in the case at bar was left with an unrecorded mortgage in his hands, and was subject to the rule of the common law; and, conceding further, in view of the evidence in this case that it is free from fraud of any kind, that it secured an honest debt, and the whole transaction was in good faith, the doctrine laid down by the circuit court of appeals for the eighth circuit in the case of Pyeatt *vs.* Powell determines this case authorit-ively in favor of the intervenor. The opinion of the circuit court of appeals for the eighth circuit upon this subject is clear, unambiguous, and in this jurisdiction authoritative. It is in short as follows: A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment
59 on the same property by a creditor of the mortgagor.

The second proposition laid down by the court of appeals for the Indian Territory, in the opinion rendered in this case, was to the effect that the mortgage law of Arkansas as put in force in the Indian Territory proscribed non-resident mortgagors. The court of appeals in the Indian Territory held that this statute forbid the recording of mortgages executed by non-resident mortgagors, and held that they were a proscribed class who, at least, as against third persons, could only create a lien on personal property by turning over the property to the mortgagee. And further the court of appeals in the Indian Territory held that the curative act of Congress of February 3, 1897, took non-resident mortgagors out of the proscribed class and conferred upon them a new right, namely, the right to have their mortgages recorded at a place designated.

The mortgage law of Arkansas, Mansfield's Digest, section 4742, failed to make any provision for a place at which the mortgages on

personal property of non-resident mortgagors could be filed and recorded. The only provision was for the filing and recording of mortgages on personal property in the county in which the mortgagor resided, or, in other words, confined the privilege of filing and recording to resident mortgagors. Under the decision of the supreme court of Arkansas in the case of Main *vs.* Alexander, 9 Ark., 112, and in Jacoway *vs.* Garrett, 20 Ark., 190, and in Hanna *vs.* Carrington, 15 Ark., 105, it was held by the supreme court of that State that a mortgage is good between the parties though not recorded, but it constitutes no lien on mortgaged property as against strangers unless acknowledged and recorded, even though they may have actual notices of its existence. This mortgage law of Arkansas was imported into the Indian Territory with that construction upon it, which is doubtless correct. When Congress put this law in force in the Indian Territory it was to be given the same construction as was placed upon it by the supreme court of Arkansas. This statute then raised the question as to whether under article 4, section 2, of the Constitution of the United States, either the State of Arkansas or the United States could pass a valid law proscribing the rights of non-residents of the State of Arkansas, or of non-residents of the Indian Territory, as compared with rights which were enjoyed by citizens of the State, and by residents of the Indian Territory. Article 4, section 2 of the Constitution of the United States reads as follows:

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Mr. Justice Washington in Corfield *vs.* Coryell, 4 Wash.
60 (U. S.), 371, in construing the meaning of the words, "privileges and immunities" as used in this section of the constitution said:

"The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from their time of becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." And see Ward *vs.* Maryland, 12 Wall. (U. S.), 430, where this definition (if it can be so termed) is approved. Mr. Justice Miller in the Slaughterhouse cases, 16 Wall. (U. S.), 76, said, with reference to these observation- of Mr. Justice Washington: "The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted." In the case of Paul *vs.* Virginia, 8 Wall. (U. S.), 180, the court, in expound-

ing this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." See also *In re* Parrott, 1 Fed. Rep., 504.

In Ward *vs.* Maryland, 12 Wall. (U. S.), 418, Mr. Justice Clifford said: "Beyond doubt, those words (privileges and immunities) are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and to hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

"Article 4, section 2, of the United States Constitution, did not, said Miller, J., in the Slaughter-house cases, 16 Wall. (U. S.), 36, create those rights which it called immunities of citizens of
61 the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restriction on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (See further American and English Enc. of Law, 2nd ed., vol. 6, pp. 70, 71, 72, and 73, and authorities therein cited.)

The State of Indiana in 1881 passed a law which provided: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be at the time a *bona fide* resident of the State, and it shall be unlawful for any person who is not a *bona fide* resident of the State to act as such trustee."

The validity of this act was in 1892 passed upon by the supreme court of Indiana, and that court held that this act of the legislature of Indiana was in conflict with the Constitution of the United States, article 4, section 2, which declares that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. The opinion in that case quotes an opinion of Judge Gresham in The Farmers' Loan & Trust Co. *vs.* Chicago & Alton R'y Co., 27 Fed. Rep., 146, in which Judge Gresham said of this statute of Indiana:

"'It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of In-

diana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship."

62 In the State of Indiana, it will be seen that non-resident trustees of real or personal property were a proscribed class, as declared by the statutes of that State, but the supreme court of that State held this proscription to be void and of no effect. The opinion of Judge Gresham on that statute is equally applicable to the statute of Arkansas, in reference to mortgages as construed by the court of appeals for the Indian Territory. The non-resident mortgagor was put in the proscribed class by both these statutes, and both of them must fall as being contrary to the Constitution of the United States.

The definition of the word privilege given by the law dictionaries is this, "A peculiar right or favor granted by law contrary to the common rule."

The right to record a mortgage on personal property, and by such record make that mortgage a lien in favor of the mortgagee is not only a peculiar right or favor granted by the law, but it is one of great pecuniary value.

Upon that right or privilege depends transactions in the Western States involving many millions of dollars, and to destroy that privilege or right would be as disastrous to commerce and trade in the Western States, and in the whole country, for that matter, as a cyclone or a civil war.

It must be conceded that this is a valuable privilege, and being such it is secured by article 4, section 2 of the Constitution of the United States to the citizens of each State in the Union, and the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.

As stated by Mr. Justice Miller in the Slaughter-house cases, the sole purpose of this constitutional provision was to declare to the several States that "whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within the jurisdiction of the State making the provisions."

The mortgagor in this case was a citizen of the State of Texas as disclosed by the evidence. He had a right under the Constitution and laws to come into the Indian Territory and bring his property

into the Indian Territory, and when here, he was entitled to all the privileges and immunities that the law of Congress conferred upon the residents of the Territory. Congress has conferred upon the residents of the Territory a great and valuable privilege, that of recording their mortgages on personal property and making
63 them liens for the security of their debts, and had made no provision for recording the mortgages of the defendant in this case, who was a citizen of the State of Texas. He was therefore le-t where the common law placed him, and without the recording of that mortgage, if it were *bona fide* and secured and honest debt, it was a lien as against attaching creditors, without being filed and recorded. That privilege cannot be denied to him under the Constitution. His privilege was equal to that, and the same as that which was enjoyed by the residents of the Territory. It will be observed that this provision is in the original Constitution. It is not in this connection a restriction upon the States, but by the 14th amendment the same principle was made a restriction upon the power of the States; but it is found in the Constitution itself, and is a limitation upon the power of Congress. Congress cannot pass a law which would deprive the citizens of one State of the equal privileges and immunities of the citizens of the several States. When Congress gave to the residents of the Indian Territory the power to record their mortgages and make them liens for the security of their debts, the citizens of Texas, and of all of the States of the Union, unquestionably had the same privilege conferred upon them. While Congress failed to make a place for recording mortgages of non-residents, the right remained unimpaired in the citizens of all the States to enjoy the same privilege and the same rights with their mortgages as *was* enjoyed by the residents of the Territory in reference to their mortgages. Congress having failed to provide a place for the non-resident's mortgage to be filed and recorded, it was as good in his hands, without recording, as was the mortgage of the resident which was placed upon record, and secured to the mortgagor and the mortgagee the equal rights and the equal benefits which the recorded mortgages of the residents of the Territory had and secured.

It may be contended that the Constitution of the United States is not in force in the Indian Territory so as to place this Territory, and the residents thereof, upon an equal footing with the citizens of the States, so far as their rights to enjoy equal privileges and immunities, but that contention is settled by the act of Congress, approved May 2, 1890 (26 U. S. St., p. 94). In the last paragraph of section 31 of that act it is provided as follows:

"The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations shall have the same force and effect in the Indian Territory as elsewhere in the United States."

One of the great and fundamental principles of our Gov-
64 ernment is the equality of all men before the law. This

great principle was enunciated in the Declaration of Independence, as follows:

"We hold these truths to be self-evident that all men are created equal."

This does not mean equal physically, intellectually, morally or socially, but it means equal under the law. It was engrafted in the Federal Constitution in section 2 of article 4. It was embraced in the 14th amendment to the Constitution, wherein it was declared:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It was further secured to the people by the civil-rights law, approved May 31, 1870. Section 1979 of the Revised Statutes of the United States provides as follows:

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

And section 5510 of the Revised Statutes of the United States provides as follows:

"SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of its color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

The foregoing provisions clearly indicate and establish that in this Government any law which deprives any class of persons who are under the protection of the United States from the enjoyment of equal privileges and immunities of others of another class of citizens, is not only prohibited by the law, but made a crime.

The supreme court of Tennessee in a recent case held that—

"Legislation intended to affect a particular class, and not the public at large, must extend to and embrace equally all persons who are or may be in the like situation and circumstances; and the classification must be natural and reasonable; not arbitrary and capricious. Sutton *vs.* State, 33 L. R. A., 589; 96 Tenn., 696; 36 S. W., 697."

The Supreme Court of the United States in construing the 14th amendment to the Constitution of the United States has held that—

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment of the Federal Constitution, but the classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Gulf, C. & S. F. R. Co. *vs.* Ellis, 165 U. S., 150; 41 L. ed., —; 17 Sup. Ct. Rep., 255."

The supreme court of California recently held that—

"A statute prohibiting barbers to carry on business after 12 o'clock on Sunday or on legal holidays, and applying to no other class of labor, is unconstitutional as special, unjust and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers. *Ex parte* Jentsch, 32 L. R. A., 664; 112 Cal., 468; 44 Pac., 803."

The supreme court of Washington recently held that—

"A city ordinance making it unlawful for barbers to pursue their calling on Sunday, without applying to other kinds of employment, is unconstitutional as class legislation. Tacoma *v.* Krech, 34 L. R. A., 68; 16 Wash., 296; 46 Pac., 255."

The Supreme Court of the United States held recently that—

"A statute imposing the penalty of an attorney's fee upon railroad corporations in case of failure to pay certain debts, without applying to individuals or other corporations, denies to railroad companies the equal protection of the laws. Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S., 150; 41 L. ed., —; 17 Sup. Ct. Rep., 255;" see also Jolliffe *vs.* Brown, 14 Wash., 155; 3 Am. & Eng. R. Cas. N. S., 254; 44 Pac., 149; see also Sweetland *vs.* A., Top. & S. F. R'y (Colo.), 22, 220; 43 Pac., 1006."

66 It is unreasonable to assume that the inhabitants of the Indian Territory who are citizens of the United States can be invested by Congress with privileges and immunities which are by the same act denied to citizens of the States of the Union who may come into the Indian Territory with their property to engage in the ordinary pursuits of life. An act of Congress which would grant privileges and immunities to residents of the Indian Territory, and at the same time deprive citizens of the States who might bring their property into the Territory of the same privileges and immunities would be unconstitutional and void. Congress cannot enact under the Constitution class legislation. Under our Constitution there must be, so far as legislation is concerned, guaranteed and secured "equal rights to all men, and exclusive privileges to none." Any act of Congress, or of any of the States, violating this great and fundamental principle of our Government is contrary to the provisions of the Constitution, and all courts, State and Federal, must, when confronted by such act, hold it to be void and of no effect whatever.

The act of Congress approved May 2, 1890, put in force in the Indian Territory certain statutes of the State of Arkansas, among which was chapter 20, entitled "Common & statute law of England." That act made the *the* common law of England, in so far as the same is applicable, and of a general nature, the rule of decision in the In-

dian Territory, except so far as altered or repealed by other acts in force therein.

The constitutional provision to which attention is called was not brought to the attention of this court when the case was tried before, nor was it brought to the attention of the court of appeals for the Indian Territory when that court passed upon the case at bar. Nor was it proved in the case, as it stood before the court of appeals, that the transaction was free from fraud, or that the mortgagor was a citizen of Texas. If these constitutional provisions, and facts which are now in the record in this case had been before the court of appeals for the Indian Territory when this case was decided in January last, there undoubtedly would have been a decision affirming the judgment of the court below in the first instance, and holding that the right of the mortgagee to the property in question was superior to that of the attaching creditors in this case. A new case, in effect, is presented, and a right invoked not heretofore suggested, which is secured to the mortgagee in this case by article 4, section 2, of the Constitution of the United States.

It is therefore my imperative duty, entertaining these views, to instruct the jury in this case to return a verdict for the interpleader, which is accordingly done.

67 And afterwards, to wit, on the 13th day of June, 1899, it being the seventh day of the regular June term, 1899, of the United States court of appeals in the Indian Territory, the following proceedings were had and made of record in said cause, to wit:

W. P. H. McFADDEN ET AL., Appellants,
vs.
EVANS-SNIDER-BUEL CO., Appellee.

This cause is this day submitted to the court upon the briefs filed herein, and the oral arguments of appellants and appellee.

And afterwards, to wit, on the 4th day of January, 1900, it being the third day of the regular January term, 1900, of the said United States court of appeals in the Indian Territory, the said court handed down its opinion in said cause, which is in the words and figures following, to wit:

In the United States Court of Appeals in the Indian Territory.

W. P. H. McFADDEN ET AL., Appellants,
vs.
JOHN R. BLOCKER ET AL., Appellees. } No. 250.

Appeal from the United States court for the northern district of the Indian Territory, Hon. Wm. M. Springer, judge, presiding.

Maxey, Clayton & Martin, and William T. Hutchings, for appellants; H. M. Pollard, Chas. B. Stuart, S. H. Cowan, S. S. Fears, and Matlock, Cowan & Burney, for the appellees.

Opinion.

CLAYTON, *Ch. J.:*

This case was before us and decided by this court at its last January term. We then reversed and remanded the case. The facts are fully stated in the opinion we then handed down. (See 48 S. W. Rep., 1043.) The case now, however, presents two different phases, one of law and the other of fact.

The new question of law raised is, that inasmuch as there was no provision in the recording acts of this jurisdiction whereby a mortgage executed by a non-resident mortgagor could be recorded, as could be done by a resident, and as the mortgagee, therefore was required to take possession of the mortgaged property to secure a lien as to third persons, whereas the holder of a mortgage executed by a resident mortgagee was not, the recording acts are, therefore,
68 unconstitutional as to the holders of such instruments. The new question of fact is that it is now shown by the proof adduced at the last trial that the attaching creditor had actual notice of the existence of the mortgage before suing out his attachment.

We will consider these two new questions in the order above stated.

The law of this jurisdiction as it stood at the time of the execution of these mortgages, and also at the time of the levying of the attachment on the mortgaged property and of the rendition of the judgment in that suit, was as follows:

"All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proved or acknowledged, shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the (*in the*) county in which the mortgagor resides." (Section 4742, Mansf. Dig.)

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." (Section 4743, Mansf. Dig.)

In this case the parties to the mortgage resided in Texas, the mortgaged property was in the Indian Territory, both at the time of

the execution of the mortgage and the levying of the attachment, and, therefore, the mortgagor, being a resident of Texas, there was no place provided by the statute where the mortgage could be recorded. The mortgaged property was left in the possession of the mortgagor. It is argued that this is such a discrimination between residents of the Indian Territory, and non-residents, as to render the statute unconstitutional, as being in violation of the first clause of section 2, art. IV, of the Constitution of the United States.

By act of Congress of May 2, 1890, certain statutes of the State of Arkansas were extended over this Territory, among them the one we are now considering. At that time the supreme court of Arkansas, in the case of Watson *v.* Lumber Co., 49 Ark., 83, passing on this very statute, had held that a mortgage executed by a non-resident of the State could not, by a recordation of the mortgage in Arkansas, create a lien as against strangers to the instrument, although they may have had actual notice of its existence; that as to mortgages executed by non-residents a lien could only be created as against strangers by the mortgagee taking possession of the mort-
69 gaged property. This statute has been the law of Arkansas for a long period of time, and its constitutionality has never been successfully assailed, and it came to us with an interpretation of the highest courts of the State from whence it came fastened upon it. It is conceded that if the statute is unconstitutional, the decision of the supreme court of Arkansas treating it as a constitutional one does not make it so, and in such a case that a decision would not be binding upon us in other cases. But the fact that for many years the learned bar and the courts of that State, and many others having similar statutes, have failed to discover its unconstitutionality, and have constantly and persistently enforced it, is *pursuasive*, at least, of its legality, and if it is so palpably unconstitutional as is now so earnestly claimed by learned counsel for appellees, how came it that at the last trial, when it was here before, that the contention was not made, or even hinted at, to us? If so plain and certain now, how is it that it had not long since suggested itself to their legal minds? Why has it lain dormant during the whole period of a long trial, both in the court below and here? The suggestion of this offspring of an afterthought probably had its origin in a somewhat inaccurate and loose expression found in the original opinion of this court in the case when it was said that the holders of such a mortgage "belonged to a prescribed class." Both in oral and written argument of counsel, as well as the opinion of the eminent jurist who tried this case below, which opinion is made an appendix to the transcript filed in this court, this expression is laid hold of and is made the foundation of the claim of the unconstitutionality of the statute. The writer of that opinion disclaims the credit, attempted to be forced upon him, of having discovered this constitutional defect.

The clause of the Constitution of the United States referred to reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the different States." (Art. IV, sec. 2, U. S. Const.)

This was intended to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. (Lemon *v.* The People, 20 N. Y., 627.) It is a limitation upon the powers of the States, and in nowise affects the powers of Congress over the unorganized Territories and Indian reservations. It is doubtless*ly* true that the citizens of all the States must be accorded equal privileges and immunities within those Territories and reservations, but it does
70 not necessarily follow that they are to have the same privileges and immunities as those residing here. There are no such limitations upon the power of Congress anywhere expressed in the Constitution. The inhabitants of a State have a dual citizenship, State and Federal. The article of the Constitution under consideration guaranteed to the "citizens of each State" all privileges and immunities of citizens in the several States. But this interstate citizenship is only granted to citizens of a State, and not to citizens of the United States. There is no citizenship of this Territory, and the only citizenship its inhabitants and residents have, or Congress can confer, is national. (Prentiss *ex.* Brenner, 11 Fed. Cases, 385; U. S. *v.* Cruikshank, 92 U. S., 542; Piquit *v.* Swann, 11 Fed. Cases, 134.)

It is plain, therefore, that unless a law deprive the inhabitants of a Territory of some property or vested right, or of personal liberty, without due process of law, that Congress has plenary power of legislation over them. And more especially is this true of this Territory, which is organized and compose- entirely of Indian reservations. Wharton Amer. Law, sec. 461; Suth. Stat. Const., sec. 23; Thompson *v.* Utah, 170 U. S., 349; Cole *v.* Cunningham, 133 U. S., 107.

It is unnecessary to point out that the right of a non-resident to have a place in which he may record a mortgage is not property, or a vested right, and to deprive him of such a privilege is not to deprive him of his property or personal liberty without due process of law, and if it be conceded that such a statute would be unconstitutional in one of the States, it is not so in this Territory.

But would such a statute as we are now considering be repugnant to this constitutional provision if it were enacted by the legislature of a State? As before stated, many of the States have such statutes, and they have always been upheld by their courts and in every instance where a change was desired, so that non-residents might be enabled to record in the county where the mortgaged property was located, it has been found necessary to resort to legislative enactment. Since this statute was, by act of Congress, extended over this Territory, Arkansas, from whence it came, has enacted a law, permitting mortgages executed by non-residents to be recorded in the county where the mortgaged property was situated, and recently the United States Congress, recognizing, inferentially, at least, its validity, has passed a similar act. (Approved Feb. 3, 1897.)

In the case of Watson *v.* Thompson Lumber Co., *supra*, the supreme

court of Arkansas, passing on this statute held it valid. The
71 statute of Michigan formerly was the same in this respect as ours. In the case of Montgomery *v.* Wight, 8 Mich., 148, the supreme court of that State, in holding the statute valid, say: "If a chattel mortgage of property here is made by a non-resident, our law contains no provision for filing it. In such a case a change of possession is, therefore, essential and cannot be dispensed with against creditors or purchasers." And the mortgage executed by a non-resident was held invalid as against a levy and sale made under an execution. In New Hampshire, the statute makes no provision for recording a mortgage executed by a non-resident mortgagor. In the case of Smith *v.* Moore, 11 N. H., 55, the supreme court say: "As between the parties the mortgage is good. * * * But by the statute of 1832, it was of no validity against the creditors of the mortgagor, unless possession was taken under it. By the provisions of that act, no mortgage or personal property subsequently made, is valid against any other person than the parties to it, unless possession of the property be delivered and retained by the mortgagee, or unless the mortgage be recorded in the office of the clerk of the town where the mortgagor resides at the time of its execution. The mortgage could not be made valid by any record of it, because the mortgagor did not reside in this State at the time, and the town clerk's office, provided for by the statute, is a record within this State, and not within another government. * * * To protect the property against creditors, where the mortgagor resides out of the State, the mortgagee must take and retain the possession." See also Granger *v.* Adams, 90 Ind., 87.

The text-writers are in accord with these decisions. Jones on Chattel Mortgages, 4 ed., section 261, says: "In case the mortgagor resides out of the State, under a statute which provides for the recording of a mortgage at the mortgagor's place of residence, and does not provide for recording it in the place where the mortgaged property is situated, there can be no effectual record of the mortgage, and therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold actual possession of the property." Cobby, vol. 2, sec. 578, says: "When the mortgagor resides outside of the State, and the only provision for the recording of the mortgage is that it shall be recorded in the county or town of the residence of the mortgagor, the mortgagee must take and hold possession of the mortgaged property, as if there was no law for the mortgaging of chattels."

The registry acts were "enacted to modify the rules of the common law, which made every chattel mortgage of articles capable of manual delivery unaccompanied with change of possession of
72 the things mortgaged *prima facie* void as to creditors of, and *bona fide* purchasers from the mortgagor; to give security to mortgagees by making their mortgages unaccompanied with possession of the property valid when recorded, and by the same record to protect creditors and purchasers against secret trusts." Pyeatt *v.* Powell, 10 U. S. A., 206 (8th ct.). And the court of appeals for the

eighth circuit, in the same case, say: "The registry acts * * * are in the nature of a police regulation of a State."

It is argued that because the effect of this statute is to prohibit a non-resident from entering into a contract whereby he may place a mortgage upon his chattels, and at the same time hold possession of them, it is unconstitutional, as prohibiting the right to contract in relation to one's personal property. But, it must be remembered that when a contract is subversive of the public interest, or against public morals, or effect- the public welfare, the legislature may control the manner in which the contract shall be executed, and, to some extent at least in such cases, control the right to contract at all.

The right to contract is not unlimited; the conflicting interest of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the Government, are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relations to others. His right to contract becomes subject to these duties; among which is the duty to so conduct himself and use his own property as not to unnecessarily injure another. He submits to such restraints and burdens as may conduce to the general comfort, health and prosperity of the State. To conserve and enforce these rights and duties, the Government can impose such restrictions upon his actions as may be appropriate for that purpose. This power inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling regulating authority. Leep *v.* R'y Co., 58 Ark., 415; Budd *v.* State of New York, 143 N. S., 517.

And it is not necessary that the contract thus brought within the control of the legislature shall be a public one or relate to public matters in which the Government or the people collectively shall have property rights. It is sufficient if it relates to a matter in which the pubic are interested.

A contract for interest on borrowed money between two individuals is purely personal and private; and yet all will now
73 agree that the usury laws are constitutional; and yet by these laws a contract for a larger rate of interest than that prescribed by the statute renders such a contract void as to such excess of interest, or the whole interest, or as to the entire contract, according to the language of the statute.

In Budd *v.* State of New York, *supra*, the Supreme Court of the United States held that the legislature had the power to fix the maximum rate to be charged by the owner of a private elevator. it has frequently been held that the legislature can regulate or prohibit the sale or manufacture of oleomargarine, for the purpose of protecting the public against fraud. Powell *v.* Commonwealth, 127 U. S., 678; 114 Pa. St., 265; State *v.* Addington, 12 Mo. App., 214; 77 Mo., 110.

The same powers are exercised in the enactment of our statutes

of fraud, which renders certain contracts void unless in writing, although such contracts are private and personal. And one of the principal reasons, if not the controlling one, in the enactment of our registry laws, is to prevent secret trusts to be fraudulently used, not as against the parties to the instrument, but as against the people generally. It is a matter in which every one who buys and sells goods and chattels has an interest. And, therefore, the subject is within the constitutional powers of the legislature, and, although a matter of private contract, may be regulated by the legislature, even to declaring such contracts void, and although such legislation may be unwise and work hardships, "yet the courts cannot interfere without usurping powers committed to another department of the Government. The appeal must be to the legislature or to the ballot-box, not to the judiciary." Powell *v.* Pennsylvania, 127 U. S., 678. And it matters not whether the (leg-lation) be by virtue of the police powers of the State, or by virtue of powers in the nature of the police power. The reasoning in both cases would be the same.

In the above-cited case of Powell *v.* Pennsylvania, the Supreme Court of the United States say:

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute is or may be conducted in such a way or with such skill or secrecy as to baffle ordinary inspection, or whether it involves such dangers to the public health as to require for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine; and as it does not appear upon the face of the statute, or of
74 any fact of which the courts must take judicial cognizance, that it infringes rights secured by fundamental law, the legislative determination of those questions is conclusive on the courts. It is not a part of their function to conduct investigations of fact entering into questions of public policy, merely, and sustain or frustrate the legislative will, embodied in a statute, as they may happen to approve or disapprove its determination of such question. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the Government has in the employment of means to that end is very large." And to the same effect are: Plumby *v.* Mass., 155 U. S., 461; Maybe *v.* Kansas, 125 U. S. 623; Leesy *v.* Hardin, 135 U. S., 100.

Does it "appear on the face of this statute, or from facts of which the court must take judicial cognizance," that "it infringes on rights secured by the fundamental law"? The statute was intended to secure the people from frauds arising from secret trusts; and as this affected the interest of the people, the legislature had full and ample power to pass it; and this power reached the non-resident as well as the resident. But, if non-residents who execute this class of instruments in the State are not to be affected by the act, but are to be left in the same attitude in which they were before, then the

legislature has but half performed its duty, and the enforcement of the law depends upon the fact as to who executed the instrument. If the instrument should be executed by a resident, the people would be protected; if by a non-resident, not; and as to all such instruments executed by them the same evils would continue to exist.

But, it is said, the legislature could have granted full relief by requiring the mortgage executed by a non-resident to be recorded in the county in which the property was situated, instead of requiring the mortgagee to take possession of the property. And it is true the legislature could have done this. But if in its judgment it were deemed that the public interest would be best subserved by adopting the one course rather than the other, is not its judgment final? Can the courts control it in a matter of judgment as between two remedies? Certainly not. From the very circumstances of the case in this particular the legislature was powerless to place residents and non-residents upon the same footing; and no one will doubt but that if legislation were necessary at all, it were necessary in the one case as well as the other; that the evils resulting from the use of unrecorded mortgages with possession of the property in the hands of the mortgagor were as great and demanded a remedy to the full extent, when executed by a non-resident as well as
75 a resident. If, then, the legislature in its wisdom and exercising its best judgment, concluded that as to non-resident mortgagors who from the fact that they did not live in the State, could not record their mortgages in a county of their residence in the State, should be required to turn over the possession of the mortgaged property to the mortgagee, instead of requiring such mortgages to be recorded in the county where the property was situated, it had the power to do so. That is what the common law required to be done, and if not done, the mortgage as to third persons was *prima facie* fraudulent and void. The statute only makes conclusive that which was before *prima facie*. The right to execute a mortgage so as to create a lien as to third parties is not interfered with, except that the manner in which it shall be done is regulated by statute. The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties and because in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public.

The next contention is, that inasmuch as it was conceded at the last trial below that the attaching creditor had actual notice of the existence of the mortgages, no record of them was necessary as to him; that as far as he was concerned, actual notice validated the mortgages. If it be true that the statutes of Arkansas, contained in Mansfield's Digest, as they had been construed by the supreme court of that State prior to the time they were extended over this jurisdiction, is binding upon us, then this contention cannot be maintained. For that State has held in many decisions and without an exception that an unrecorded mortgage, with possession of the mortgaged property in the mortgagor, created no lien as to third parties, whether

there was actual notice or not; and this was decided and authorities cited when the case was last before us.

In Cross *v.* Fomby, 54 Ark., 178, the supreme court of Arkansas say: "We have no hesitation in saying that, under the statute of this State, an order of attachment becomes a lien upon the property of the defendant, subject to seizure on execution for the debts of the defendant in the county from the time the order comes to the hands of the officers; and that by levy of the attachment and judgment sustaining the same, such inchoate lien is perfected, and takes precedence of the lien of a mortgage executed before the order of the attachment came to the hands of the officers, but not re-
76 corded till afterward. * * * Though good between the parties, until filed for record under the statute, the lien of the mortgage as to third parties has no existence, and is not binding upon them, though they have actual notice of it." In the case of Dodd *v.* Parker, 40 Ark., the same court say: "Our statute of mortgage is peculiar. It provides that every mortgage shall be a lien on the mortgaged property from the time it is filed for record and not before, which filing shall be notice to all persons of the existence of a mortgage. And it cannot be legally filed for record until it has been properly acknowledged. Hence, it has been uniformly held in this State that an unregistered mortgage, or one which has been improperly admitted to registration, constitutes no lien upon the mortgage property as against a stranger, notwithstanding he may have actual knowledge of its existence." In Jacoway *v.* Gault, 20 Ark., the court say: "A mortgage not acknowledged or proven and recorded, as required by statute, though good as between the parties to it, is not valid as against subsequent purchasers or encumbrancers of the mortgaged premises, though they have actual notice of the existence of the mortgage." In Watson *v.* Thompson Lumber Co., *supra*, a case identical with this in all its features, the supreme court of Arkansas say: "It has been repeatedly held by this court that a mortgage is good between the parties thereto, though not acknowledged and recorded, but constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded, even though they have actual notice of its existence." And then proceeds to decide the principal question in this case, that a non-resident can execute no mortgage without turning over the possession of the mortgaged property to the mortgagee, which will create a lien as against strangers to the instrument. See also Main *v.* Alexander, 9 Ark., 112; Hannah *v.* Carrington, 18 Ark., 105; Haskill *v.* Livin, 25 Ark., 158.

While it is true that there may be certain conditions existing whereby this court would not be bound by the previous adjudications of the supreme court of Arkansas upon a statute of that State extended by act of Congress over this Territory, yet this case presents no such conditions. It has been repeatedly decided by this court, as well as by the court of appeals for the eighth circuit, and the Supreme Court of the United States, that a statute of a State extended over another jurisdiction is to be enforced in the latter jurisdiction as interpreted by the highest court of the State from whence

it came. Sanger *v.* Flow, 1 C. C. A., 56; Stutsman Co. *v.* Wallace, 142 U. S., 295.

77 The act of Congress of May 2, 1890, extending these statutes over the Indian Territory, reads as follows:

"That certain general laws of the State of Arkansas, in force at the close of the session of the General Assembly of that State of eighteen hundred and eighty-three as published in eighteen hundred and eighty-four, in the volume known as Mansfield's Digest of the Statutes of Arkansas, etc., are hereby extended over and put in force in the Indian Territory."

It is the "general laws in force in the State of Arkansas" at that time which were extended. And the general laws of that State in force then were the statutes, not as they might be hereafter construed, but as they were then construed by the highest court of Arkansas. In other words the decided laws were the general laws of the State then in force, and it was the general laws then in force that were extended. And therefore the interpretation of the supreme court of Arkansas had prior to the extension of the statute over this Territory, to the effect that an unrecorded mortgage created no lien as to strangers to the instrument, although they may have had actual notice of its existence, is, as we have before said, the statutory law of this jurisdiction.

And if this were a new question, undecided by any court, from what we conceive to be a correct interpretation of the statute, we would be compelled to hold, as the supreme court of Arkansas held, and range ourselves with those States which hold that actual notice of the existence of an unrecorded mortgage creates no lien as to strangers. The language of the statute is: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed for record and not before." If not to become a lien until filed for record, if before that time, it is not to become a lien at all, how can actual notice of the existence of a mortgage not filed for record make it a lien on the property? Such a construction would be construing away the very language of the statute.

In the case of Main *v.* Alexander, *supra*, decided by the supreme court of Arkansas in 1848, it was contended that the language of the act forbade a lien even as between the parties to the mortgage, but that court very properly held that as the recording acts were intended to give notice to strangers of an existing lien as between the parties they could not have any effect as to them and the court then say:

"The rights of the parties to a mortgage, whether acknowledged and recorded or not, are precisely the same as they were before the passage of the act referred to, and the only real difference
78 consists in the fact that although actual notice may be shown, it will constitute no answer to the demands of strangers, and that nothing short of an actual filing for record will be recognized as such a notice as to effect his rights."

In this case, therefore, we are compelled to hold that the fact that the attaching creditor had actual notice of the existence of these un-

recorded mortgages put him in no different condition than if he had had no such notice, unless it can be shown that the mortgages may be considered as at common law.

It is conceded that inasmuch as our recording acts made no provision for recording a mortgage executed by a non-resident mortgagor, such mortgages are not affected by it, and as the legal effect of all mortgages executed prior to the enactment of the statute in this jurisdiction were determined by the rules of the common law, so should these mortgages be, and to sustain this contention, counsel rely on the case of Pyeatt *v.* Powell, 10 U. S. A. 200, (8th ct.). But in that case, the mortgage was executed, and an execution levied upon the mortgaged property before the act of Congress extending the recording acts over the Indian Territory was passed. At that time we were without any statute upon the subject. The mortgagor resided, and the mortgaged property was situated, in the Indian Territory. The court held that while the common law may not prevail in the Indian Territory, yet in the Federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action, and, therefore, as there was no statutory law here relating to mortgages, nothing requiring them to be recorded, or changing the rule of the common law, and the action having been brought in a Federal court, and it having been shown that the mortgage having been executed, and the possession of the property retained by the mortgagor in good faith, the court held that under these circumstances, the common-law rule must prevail, and formulated the rule as follows:

"The rule of the common law is that a mortgage of personal property, unaccompanied with possession, is *prima facie* void as to creditors of the mortgagor; yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession."

But this rule, however, was applied in the case solely because the action was pending in a Federal court and there was no statute changing the common law as a rule of decision for that court.

But there has since been an act of Congress, extending
79 over this Territory, among many others, the recording statutes of the State of Arkansas, and thereby changing the rule of decision in this particular from the common law to the statutory law as it existed in Arkansas in 1883, and this law was in force here at the time the mortgages in this case were executed and the writ of attachment levied upon the property. By the act of Congress, the whole system relating to the recordation of mortgages and to their liens and to the effect of such recordation, in the State of Arkansas, as they had existed there for many years, was extended over the Indian Territory. The whole subject was embraced by the act, bringing it strictly within the rule, "*expressio unius est exclusio alterius.*" If the statute provided no place for recording a mortgage executed by a non-resident mortgagor, it intended it. If in the wisdom of the legislature it was thought best that in such case the mortgagee should be required to take possession of the mortgaged

property rather than to allow him to record it at the place where the mortgaged property should be situated, it had the power to do so; and the reason for such action as to personal property is apparent. Today the non-resident owner of chattels, a man who may be in today and out tomorrow, *may place a mortgage* upon them and record it in the county where situated; in a week hence he may have them in a county an hundred miles away, and, keeping secret the fact that he had executed a mortgage upon them and had it recorded in one of the counties through which he had passed, he may deal with them as his own, and convey or otherwise dispose of them as his own, and thus defeat the very object of the recording acts. The very difficulty of locating the place of record in such cases would render the statute almost a nullity. Certainly the legislature never intended that any mortgages executed in the State should be left subject to the same abuses and liable to the same fraudulent uses as they were before the act; if, however, the contention of learned counsel for appellee be correct, that all mortgages executed by non-residents of the State are to be considered and treated as at common law, then as to all of the evils intended to be corrected still exist, and non-resident mortgagors are given the advantage over residents to the extent that they may, by the use of such instruments, continue the creation of secret trusts and such other fraudulent acts as the statute intended to remedy; besides we would be placed in the remarkable condition of having two rules of decision for our courts, the statutory rule for residents, and the common-law rule for non-resident mortgagors. Before the passage of the statute, all mortgages in Arkansas were at the common law, and it was the evils attendant upon the use of the common-law mortgage
80 that the act intended to remedy, and it would be absurd to claim that the legislature intended to correct the evil when the mortgage should be executed by one class of people, and not when executed by another. In our opinion, it was intended by the act that in the execution of a mortgage by a non-resident mortgagor upon the property in the State, so as to create a lien as to third parties, actual delivery of possession to the mortgagee and retention of possession by him must be had, and if intended, it is the command of the legislature, and must become our statutory rule of decision. If this be not true, then all of the States which have been enforcing this statute in accordance with the view here expressed, are at fault, for the same objection made here would hold good as to any of the States having the same statute.

We therefore hold that the effect of the statute was to require all mortgages executed by non-residents of this Territory, before they could become liens as to third parties, to be accompanied by possession of the mortgaged property by the mortgagee, and that such legislation was constitutional. And we further hold that a mortgage not filed for record created no lien as to strangers, although they may have actual notice of its existence.

The judgment of the United States court for the northern district is therefore reversed, and at the request of counsel for all the parties made here in open court, judgment is here rendered for the appel-

lant, saving to the appellee all his rights of appeal to the United States circuit court of appeals for the eighth circuit.

Thomas, J.; Townsend, J.; Gill, J., concur.

Indorsed: Filed January 4th, 1900. Wm. P. Freeman, clerk.

Upon which said opinion the said court on the said 4th day of January, 1900, rendered and caused to be entered of record in said cause, the following judgment, to wit:

W. H. P. McFADDEN ET AL., Appellants,
vs.
JNO. R. BLOCKER ET AL., Defendants, with EVANS-SNIDER BUEL Co., Interpleaders, Appellees.

This cause came on to be heard this the 4th day of January, 1900, upon the transcript of the record of the United States court for the northern district of the Indian Territory held at Wagoner, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings, record and judgment of said United States court for the northern district of the Indian
81 Territory in this cause, in this; the court erred in directing the jury to return a verdict in favor of the interpleaders, Evans-Snider-Buel Co.

It is therefore considered by the court that the judgment of said United States court for the northern district of the Indian Territory, sitting at Wagoner in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and all parties being present and represented by counsel, it is here in open court agreed that this court shall render judgment instead of remanding said cause for a new trial against the interpleader and its bondsmen for the amount of the judgment heretofore rendered in this cause against the defendant-, J. R. Blocker *et al.*, on the 29th day of January, 1897, together with the interest on the same to date, and all other costs in this behalf expended; it being understood that said agreement shall not affect the right of said interpleaders, or J. R. Blocker, to sue out or prosecute their writs of error from this court to any United States court having jurisdiction of this case.

And it being further shown in the evidence that the property levied on under the writ of attachment was taken by the interpleader and sold, it is therefore considered, ordered, and adjudged that the plaintiffs, W. P. H. McFadden, in his own right, and W. P. H. McFadden and Jas. A. McFadden, as executors of William McFadden, deceased, have and recover of and from the interpleader, Evans-Snider-Buel Co., and its sureties on the interpleader's bond: C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, the sum of $72,250.35, together with 6% interest thereon from this date, and all the costs incurred by the plaintiff in this court and in the court below in this action; and the clerk of this court is hereby authorized to issue exe-

cution for the amount of said debt and the costs of this court, together with the costs of this cause in the United States court for the northern district at Muskogee, Wagoner, and Tahlequah, and the clerk of the United States court for the northern district is hereby directed and ordered to send up a certified bill of the costs at each of the above-named places of holding court, and the same shall be included in said execution, to all which the appellees excepted in open court.

And afterwards, to wit, on the 13th day of January, 1900, the said appellee filed its petition for a writ of error, which is in the words and figures following, to wit:

82 In the United States Circuit Court of Appeals for the Eighth Circuit.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPAULDING, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error,

vs.

W. P. H. MCFADDEN, in His Own Right, and W. P. H. MCFADDEN and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.

Petition for Writ of Error.

To the honorable chief justice and judges of the United States court of appeals for the Indian Territory:

Your petitioners, Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error in the above cause, respectfully show that the above cause is now pending in the United States court of appeals for the Indian Territory, and that a judgment has been herein rendered (reversing and rendering a judgment in the United States court in the Indian Territory, in and for the northern judicial district) against Evans-Snider-Buel Company, and against C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, sureties, and that the matter in controversy in said suit exceeds one thousand ($1,000) dollars, besides costs, and that the jurisdiction of none of the other courts above mentioned is dependent in anywise upon the opposite parties to this suit or controversy, being aliens or citizens of the United States, or citizens of the different States; and that this case does not arise under the patent laws, nor revenue laws, nor criminal laws, and that it is not an admiralty case; and that it is a proper case to be reviewed by the United States court of appeals for the eighth circuit, upon writ of error.

And your petitioners would therefore respectfully pray that a writ of error be allowed in the above-entitled cause, directing the clerk of the United States court of appeals for the Indian Territory to send up the record and proceedings in said cause, with all things

concerning the same, to the (*the*) United States circuit court of appeals for the eighth circuit, in order that the errors complained of in the assignments of error, herewith filed by said plaintiffs
83 in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

EVANS-SNIDER-BUEL COMPANY,
C. W. TURNER,
H. B. SPAULDING,
HENRY M. POLLARD,
AMOS T. ATWATER,
MUNSON P. BUEL, AND
CHESTER A. SNIDER.
By H. M. POLLARD AND
STUART & GORDON,
Their Attorneys.

Allowed.
WM. H. H. CLAYTON,
Judge of the United States Court of Appeals for the Indian Territory.

Indorsed: No. 250. Petition for writ of error. Filed January 13th, 1900. Wm. P. Freeman, clerk.

And at the same time, to wit, on said 13th day of January, 1900, the said plaintiffs in error filed their assignments of error, which *is* in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *versus* W. P. H. McFadden, in His Own Right, and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.	No. 250.

Assignments of Error.

Now come Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, and say, that in the foregoing record and proceedings there is manifest error in the action, rulings, opinions, judgment and decree of the United States court of appeals for the Indian Territory in this, to wit:

I.

The United States court of appeals for the Indian Territory erred in holding that the act of Congress of the United States, in relation to mortgages in the Indian Territory, approved February 3rd, 1897, was not retrospective.

2.

The United States court of appeals for the Indian Territory erred in not holding that the act of Congress of the United States, approved February 3rd, 1897, validated all mortgages on per-
84 sonal property in the Indian Territory, which prior to said act had been executed and recorded in the judicial district in which the property was situated at the time, from the date of their original filing or recording.

3.

The United States court of appeals for the Indian Territory erred in holding that the right acquired by McFadden and others, by levy of their writ of attachment upon the property in controversy on the 17th day of June, 1896, and by the judgment of the court sustaining such attachment, was such a vested right as could not be taken away or impaired by an act of Congress of the United States.

4.

The United States court of appeals for the Indian Territory erred in holding that McFadden and others, by levying their writ of attachment upon the property in controversy, with actual notice of the mortgage upon the same, held and owned by plaintiffs in error, acquired rights superior to those of the mortgagee under said mortgage.

5.

The United States court of appeals for the Indian Territory erred in holding that sections 4742 and 4743 of Mansfield's Digest, chapter 110, in force in the Indian Territory prior to February 3rd, 1897, applied or had reference to non-resident mortgagors.

6.

The United States court of appeals for the Indian Territory erred in not holding that sections 4742 and 4743 of Mansfield's Digest, applied exclusively to resident mortgagors, and that where the mortgagor was a non-resident, the rights of his mortgagee as against attaching creditors, were to be determined, not by the recording acts, but by the common law in force in the Indian Territory.

7.

The United States court of appeals for the Indian Territory erred in not holding that sections 4742 and 4743 of Mansfield's Digest, were, in so far as the same applied to non-resident mortgagors, unconstitutional and void.

8.

The United States court of appeals for the Indian Territory erred in not confirming the judgment of the United States court for the northern district of the Indian Territory, in this cause rendered.

85 9.

The United States court of appeals for the Indian Territory erred in reversing and rendering the judgment of the United States court for the northern district of the Indian Territory.

Wherefore, and for divers other errors apparent on the face of the record, the Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, pray that said proceedings, as well as the judgment of the United States court of appeals for the Indian Territory, be reversed, and judgment rendered.

H. M. POLLARD &
STUART & GORDON,
Attorneys for Appellees.

Indorsed: No. 250. Assignments of error. Filed January 13th, 1900. Wm. P. Freeman, clerk.

And afterwards, to wit, on the 31st day of January, 1900, the said plaintiffs in error filed their supersedeas bond in said cause, which is in the words and figures following, to wit:

Know all men by these presents, that we, Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, as principals, and American Surety Company of New York, a corporation, organized and existing under the laws of the State of New York, as sureties, are held and firmly bound unto W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, in the full and just sum of one hundred thousand dollars, to be paid to the said W. P. H. McFadden, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, their heirs, executors, administrators or assigns, of which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 29th day of January, in the year of our Lord one thousand nine hundred.

Whereas, lately at the January term of the United States court of appeals for the Indian Territory, in a suit depending in said court between W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, appellants, and Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, appellees, judgment was rendered against the said Evans-Snider-Buel Company, C. W.
86 Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, and the said Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, *have* obtained a wr't of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. P. H.

McFadden, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after said citation. Now the condition of the above obligation is such that if the said Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void else to remain in full force and virtue.

[SEAL.] EVANS-SNIDER-BUEL CO.,
By M. P. BUEL, *President.*

A. T. ATWATER, *Sec.*

M. P. BUEL.
A. T. ATWATER.
HENRY M. POLLARD.
CHESTER A. SNIDER.
AMERICAN SURETY CO. OF NEW YORK,
By EBEN RICHARDS,
Resident Vice-President.

Attest:
[SEAL.] R. L. RINAMAN,
Resident Ass't Secretary.

Approved.
JOHN R. THOMAS,
Judge U. S. Courts and Associate Justice U. S. Court of Appeals for the Indian Territory.

STATE OF MISSOURI, } ss:
City of St. Louis, }

On this 29th day of January, 1900, before me came R. L. Rinaman, known to me to be the resident ass't secretary of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Evans-Snider-Buel Co. *et al.*, as surety thereon, and who, being by me duly sworn, did say that he resides in the city of St. Louis, State of Missouri; and that he is the resident ass't secretary of the American Surety Company of New York, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York, and has complied with the provisions of the act of Congress
87 of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that said company has also complied with the provisions of the laws of the *State of* Indian Territory and — Missouri, relating to the business of surety companies in said State; that the seal affixed to the annexed bond of the Evans-Snider-Buel Co. *et. al.*, is the corporate seal of said American Surety Company of New York and was thereto affixed by order and

authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident ass't secretary of said company; that he is acquainted with Eben Richards, and knows him to be the resident vice-president of said company, and that the signature of the said Eben Richards subscribed to said bond is in the handwriting of the said Eben Richards, and was thereto subscribed by order and authority of the said board of directors; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts and liabilities of every nature whatsoever, by the *the* sum of more than five hundred thousand dollars. R. L. RINAMAN.

Sworn to, acknowledged before me, and subscribed in my presence, this 29th day of Jan'y, 1900.

My commission expires May 5, 1902.

[SEAL.] H. G. CLEVELAND,
Notary Public for the City of St. Louis, State of Missouri.

Indorsed: No. 250. Supersedeas bond. Filed January 31st, 1900. Wm. P. Freeman, clerk.

UNITED STATES OF AMERICA, }
Indian Territory, } *ss.*

In the Court of Appeals.

I, William P. Freeman, clerk of the United States court of appeals in the Indian Territory, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the cause therein named, in said court, as the same remains on file and of record in my office. I further certify that the original writ of error and citation is returned herewith and made a part hereof.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof, I have hereunto set my hand and affixed the seal of our said court at office in the city of South McAlester, Indian Territory, this 17th day of February, A. D. 1900.

WM. P. FREEMAN, *Clerk.*

(Cancelled 10c. U. S. int. rev. stamp.)

Filed Feb. 20, 1900.

JOHN D. JORDAN, *Clerk.*

88 (*Appearance for Plaintiffs in Error.*)

And on the twentieth day of February, A. D. 1900, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. H. McFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the plaintiffs in error.

U. M. ROSE.
W. E. HEMINGWAY.
G. B. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. H. McFadden *et al.* Appearance. Filed Feb. 20, 1900. John D. Jordan, clerk. U. M. Rose, W. E. Hemingway, G. B. Rose, counsel for plaintiffs in error.

(*Appearance for Plaintiffs in Error.*)

And on the twentieth day of February, A. D. 1900, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. McFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the plaintiffs in error.

H. M. POLLARD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Co. *et al.*,
89 plaintiffs in error, *vs.* W. P. McFadden *et al.* Appearance. Filed Feb. 20, 1900. John D. Jordan, clerk. H. M. Pollard, counsel for pl'ffs in error.

(*Appearance for Defendants in Error.*)

And on the fourteenth day of March, A. D. 1900, an appearance of counsel for defendants in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. MCFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the defendants in error.

WILLIAM T. HUTCHINGS.
N. B. MAXEY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. McFadden *et al.* Appearance. Filed Mar. 14, 1900. John D. Jordan, clerk. William T. Hutchings, N. B. Maxey, counsel for defendants in error.

(*Order of Submission.*)

And on the fourth day of June, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. MCFADDEN ET AL. } No. 1403.

In error to the United States court of appeals in the Indian Territory.

MONDAY, *June* 4, 1900.

90 This cause having been called for hearing this day, it was, on application of counsel, ordered that the time for argument be extended one hour to each party, whereupon argument was commenced by Mr. U. M. Rose for plaintiffs in error, continued by Mr. W. T. Hutchings and Mr. N. B. Maxey for defendants in error, and concluded by Mr. H. M. Pollard and Mr. U. M. Rose for plaintiffs in error..

Thereupon this cause was submitted to the court on the transcript of record from said United States court of appeals and the briefs of counsel filed herein.

(*Opinion.*)

And on the nineteenth day of November, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the words and figures following, to wit:

91 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1900.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error, *vs.* WILLIAM McFADDEN ET AL., Defendants in Error.	No. 1403. In Error to the United States Court of Appeals in the Indian Territory.

Mr. U. M. Rose and Mr. H. M. Pollard (Mr. C. B. Stuart, Mr. W. E. Hemingway and Mr. G. B. Rose were with them on the brief) for the plaintiffs in error.

Mr. W. T. Hutchings and Mr. N. B. Maxey (Mr. J. B. Clayton was with them on the brief) for the defendants in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

The record in this case discloses the following facts, in the light of which it is to be determined: On June 17, 1896, the Evans-Snider-Buel Company, the principal plaintiff in error, held two deeds of trust in the nature of mortgages, one dated April 23, 1896, and the other May 19, 1896, covering about six thousand seven hundred and seventy-five head of cattle, which deeds of trust had been executed by John R. Blocker, who was at the time a resident and citizen of Bexar county, State of Texas. The cattle described and covered by the two deeds of trust were at the time in pasture near the town of Muskogee, in the Creek Nation of the Indian Territory. The deeds of trust were given to secure the payment of notes executed by John R. Blocker to the amount of about $130,000, which were held at the time by the Evans-Snider-Buel Company and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle in controversy. The testimony shows without any contradiction that Blocker had not advanced any money of his own to purchase the cattle but that they had been acquired with funds furnished for that purpose by the Evans-Snider-Buel Company. Both deeds of trust were filed for record and were recorded, within a day or two after their execution, in the clerk's office of the United States court for the northern district of the Indian Territory, that being the district in which the mortgaged
92 property was located. One of the mortgages, being the one that was first executed to secure notes to the amount of $122,184.60, was also recorded the day after it was executed in Bexar county, Texas, where the mortgagor resided.

On June 17, 1896, William McFadden and Son, the defendants in error, commenced a suit by attachment against John R. Blocker

in the United States court for the northern district of the Indian Territory upon a judgment in the sum of $55,875.71, which the attaching creditors had recovered against John R. Blocker in Jefferson county, Texas, on May 26, 1887. On June 29, 1896, they caused the writ of attachment in that suit to be levied on the cattle covered by the aforesaid deeds of trust, which were then in pasture near Muskogee in the Indian Territory. At the time of directing the levy of the writ of attachment McFadden and Son were aware of the existence of the two deeds of trust aforesaid, they having obtained a description of the cattle on which they directed the levy to be made by examining the description contained in said deeds of trust as then recorded in the Indian Territory.

On July 14, 1896, the Evans-Snider-Buel Company gave bond as interpleader in the cause, in the sum of $150,000, and having given such bond in accordance with law, was permitted to retain possession of the attached cattle. The writ issued in the attachment suit was returnable on the 3rd day of December, 1896, and at the return term of the writ, to wit, on January 27, 1897, the Evans-Snider-Buel Company filed its interplea in due form, asserting therein that the cattle were not subject to seizure and sale as the property of John R. Blocker, but were its property. Two days later, to wit, January 29, 1897, judgment by default in the sum of $55,875.71 was rendered against J. R. Blocker in the attachment suit, he having failed to make answer to the complaint.

Subsequently the issue arising on the interplea in the case as between the Evans-Snider-Buel Company and William McFadden and Son was twice tried and resulted on each occasion in a verdict in favor of the interpleader and against the attaching creditor, which judgments, however, were in each instance reversed on appeal by the United States court of appeals in the Indian Territory. The opinion of that court on the first appeal is reported in 48 S. W. Rep., 1043. On the last reversal the United States court of appeals in the Indian Territory rendered a judgment in favor of the attaching creditors and against the interpleader and the sureties on its bond in the sum of $72,250.35. The interpleader has brought the case to this court for review.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

Among the numerous chapters of Mansfield's Digest of the Laws of Arkansas which were extended over and put in force in the Indian Territory by the act of Congress of May 2, 1890 (26 Stats., 81, 95, c. 182), was chapter 110, entitled "Mortgages," which chapter contains among others the following sections:

"SECTION 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that
93 deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"SECTION 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Prior to the adoption of the chapter concerning mortgages as the law of the Indian Territory, it had been decided by the supreme court of Arkansas in Main *v.* Alexander, 9 Ark., 112, that by force of the aforesaid sections a mortgage on personal property executed in that State was good as between the parties thereto, though not acknowledged and recorded, but that it constitutes no lien upon the mortgaged property as against strangers until it is acknowledged and recorded in the mode prescribed by the statute although they have actual notice of its existence. The doctrine last stated had been recognized and enforced in the State of Arkansas in several other cases prior to May 2, 1890, but in some cases, notably in Martin *v.* Ogden, 41 Ark., 186, 192, and in Ford *v.* Burks, 37 Ark., 91, 94, it had been criticised as harsh and unjust and not in harmony with equitable principles as they prevail elsewhere. It had also been decided as early as 1886 in Watson *v.* Thompson Lumber Co., 49 Ark., 83, that a foreign corporation, not being a resident of that State, could not execute a mortgage on personal property located in that State which it owned, and by placing it of record create a lien which would be good as against strangers. In Main *v.* Alexander the controversy arose between a mortgagee whose mortgage was recorded but not properly acknowledged and a creditor of the mortgagor who had attached the mortgaged property subsequent to the execution and record of the mortgage, and it was decided that the lien of the attaching creditor was paramount. In the case of Watson *v.* Thompson Lumber Co., the controversy arose between a mortgagee who held a mortgage executed by a foreign corporation that was recorded in the county where the property was situated, and certain judgment creditors of the mortgagor company who had caused executions to be levied on the mortgaged property, subsequent to the execution and recording of the mortgage, and it was held that the lien of the judgment creditors was paramount to that of the mortgagee.

On February 3, 1897 (29 Stats., 510, c. 136), Congress passed an act to the following effect:

"That section forty-seven hundred and forty-two of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: 'Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.'"

94 As this statute in express terms validated all mortgages theretofore made by non-residents of the Indian Territory on personal property there located which had been recorded in the

judicial district where the property was situated, and therefore embraced and validated the two mortgages that had been executed by J. R. Blocker in favor of the Evans-Snider-Buel Company—one of the principal questions discussed before this court concerns the power of Congress to enact the statute aforesaid and give to it such retrospective operation. It will be observed that William McFadden and Son, hereafter referred to as the attaching creditors, caused the writ of attachment in the action brought by them against J. R. Blocker, the mortgagor, to be levied on the cattle that were conveyed by the mortgage, about seven months before the act of Congress validating the mortgage was approved; also, that the judgment by default was entered in that case against the attached debtor five days before the law was enacted. But when the act was approved the interplea of the Evans-Snider-Buel Company in the attachment suit was still pending and undetermined as well as when the judgment by default was taken, and no trial of the issue existing between the interpleader and the attaching creditors was had until several months thereafter, to wit: on April 20, 1897.

We deem it wholly unnecessary to indulge in any extended discussion of the question which has been mooted, whether the act of Congress aforesaid impairs the obligation of a contract and is for that reason void, first, because the inhibition against the exercise of such power which is contained in section 10, article 1, of the Federal Constitution is not addressed to the national legislature, but to the legislatures of the several States; Mitchell *v.* Clark, 110 U. S., 633, 643; Legal Tender cases, 12 Wall., 457; Beach on Modern Law of Contracts, sec. 1633; and second, because no contract is disclosed by the record which the act of Congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker and that judgments are sometimes termed "contracts of record," but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him and that he may be sued in form *ex contractu* on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as the result of a legal implication—is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair its obligation. This proposition is well established by controlling authority, State of Louisiana *ex rel.* Folsom *v.* Mayor of New Orleans, 109 U. S., 285, 288; Garrison *v.* City of New York, 21 Wall., 196, 203.

If the act of Congress of February 3, 1897, above quoted, is invalid, it is made so by virtue of the fifth amendment to the Federal Constitution, which, in so far as it is pertinent here, declares that "no person * * * shall be deprived of life, liberty or property without due process of law." This is a limitation on the power of Congress, and the question is, whether the attaching creditors will be deprived of a property right in the cattle which they have caused to be seized under the writ of attachment in their favor, if the act

given effect according to the manifest purpose of the law-maker.

It is urged in behalf of the attaching creditors that the lien obtained by virtue of the writ of attachment was of such nature that it could not be impaired by an act of Congress even if had been passed prior to the entry of the judgment by default gainst J. R. Blocker, the mortgagor, and certain authorities are ited in support of that contention, notably Day *v.* Madden, 9 Colo. pp., 464; Mulnix *et al. v.* Spratlin *et al.*, 10 Colo. App., 590; Hall *v.* tephens, 65 Mo., 670, 681; and Hannahs *v.* Felt, 15 Iowa, 141; but ree of these cases, the same being those that are first cited, were cided in States whose constitutions at the time declared that no * * * law retrospective in its operation * * * shall e passed," and in two of the cases the ruling to the effect that the en of an attachment cannot be divested by a legislative enactment t any time after the writ is levied, appear to have been based ainly on the theory that to give an act of the legislature the effect f impairing an existing attachment lien, would conflict with the ecal constitutional provision last quoted. The Iowa decision in Hannahs *v.* Felt, *supra*, does not appear to have been made under he influence of such a constitutional provision as has been adopted n Colorado and Missouri. In that case, however, the decision deny-ng the efficacy of a legislative act to discharge the lien of an attach-ment, was based principally on the ground that the act under con-deration did not in terms attempt to divest such liens, but that its eal purpose was to postpone for the time being sales of property be-onging to persons in the military service, either under a mortgage r deed of trust, or by virtue of an execution under a judgment or ecree. In so far, however, as that decision lends support to the aim that an attachment lien cannot be impaired at any time by gislative action, even where the legislature is not deprived of the ower to pass laws that are retrospective in their operation, it is not ly opposed to the decision of this court in National Bank of Com-erce *v.* Reithmann, 49 U. S. App., 144; 25 C. C. A., 101; 79 Fed. ep., 582, but to the decisions of other courts in cases where the estion has been expressly raised and decided. Freiberg *et al. v.* nger *et al.*, 90 Wis., 608; Stephenson *v.* Doe, 8 Blackford (Ind.) 8, 513. Considered as an original proposition the weight of ason, as well as the authorities on kindred questions, sustain the ew that an attachment lien, at least until a final judgment is ndered in the case, may be impaired, displaced or destroyed by gislative enactments which are designed to have that effect and at attaching creditors have no just ground to complain of such gislation. A writ of attachment is nothing more than a remedy forded by law for the collection of a debt. It is like a *capias respondendum* and a remedy of that nature may be abolished any time by the legislature which created it. The same prop-ition holds good with respect to all laws which merely provide medies for the enforcement of rights or the redress of grievances. ey may be modified or repealed without reference to the effect of ch legislation on pending actions, the only limitation on the power

of the legislature in this respect being that an adequate remedy must remain or be provided for the enforcement of such existing rights as have their origin in private contracts. In actions *ex contractu* litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that
96 were available when the contract was made or that have accrued subsequently under existing laws, the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation, may be altered or abolished even after an action is instituted, provided an adequate remedy remains for rights founded on contract, and that some defenses such as those existing under usury laws and those that have accrued under statutes of limitation may be withdrawn and rendered of no avail. These principles are so familiar that a few cases only need be cited in their support. Terry *v.* Anderson, 95 U. S., 628, 633; Campbell *v.* Iron Silver Min. Co., 83 Fed. Rep., 643, 645; 55 U. S. App., 150; Wilson *v.* Simon, 45 Atl. Rep., 1022; Campbell *v.* Holt, 115 U. S., 620, 628; Ewell *v.* Daggs, 108 U. S., 143, 151; Morley *v.* Lake Shore R'y Co., 146 U. S., 162, 168; Van Hoffman *v.* City of Quincy, 4 Wall., 535, 553; Butler *v.* Palmer, 1 Hill (N. Y.), 324, 329, 330; Curtis *v.* Leavitt, 15 New York, 1, 152, 153; Sutherland on Statutory Construction, sec. 482. We are of opinion, therefore, that a legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to divest or impair an attachment lien at least until there has been an adjudication that adequate grounds for the attachment exist and that the lien of the attachment be enforced. The power of Congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as by making use of the remedy the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate.

It is insisted, however, in behalf of the attaching creditors that they acquired a vested right or a vested interest in the cattle by the rendition of the judgment by default on January 29, 1897, which could not be impaired by a subsequent legislative enactment and that this proposition is tenable even if it be true, as last above held, that prior to that time the lien of the attachment might have been displaced by an act of Congress. With reference to this contention it may be said, that it is undoubtedly true that by the rendition of the judgment by default Blocker, the defendant in the attachment suit, lost his right to challenge the existence of the grounds of attachment on account of which the writ had been obtained, as well as the right to deny the fact of his indebtedness to the attaching creditors or the amount thereof. These were issues which the defendant in the attachment suit, and he alone, was entitled to raise. The Evans-Snider-Buel Company was not concerned therein and it is doubtful, to say

the least, if it was entitled to be heard with respect thereto, since its right to the cattle depended on other considerations. But, be this as it may, the judgment by default did not determine as against the party last named who had intervened in the attachment suit, as it had a right to do, and had denied the right of the attaching creditors to subject the attached property to the payment of their claims, that it could be so appropriated. That was an issue which remained to be
97 tried when the act of Congress of February 3, 1897, was approved, and it was in nowise affected by the judgment by default. It is difficult to understand, therefore, why the entry of that judgment changed the status of the case *eo instanti* as respects the interpleader and deprived Congress thenceforth of the power to enact a law which prior thereto it possessed the power to enact. The interpleader's rights were not adjudicated, since the judgment by default did not determine that the lien asserted by the attaching creditors upon the cattle in controversy was superior to the lien which was asserted by the interpleader. That question remained undecided and was left open for future consideration and decision. The phrase "a vested right" has no very precise signification. It is an expression which is not used in the Federal Constitution nor in any of its amendments, the language of the fifth amendment being that "no person * * * shall be deprived of * * * property without due process of law." In the law of real property, where it is most frequently employed, the word "vested" is used to define an estate either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency. And when the phrase "a vested right" or a "vested interest" is used in other relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established and is no longer open to doubt or controversy. If the words in question are understood in that sense it cannot be said that the attaching creditors acquired a vested right to the cattle as against the interpleader, by the judgment in their favor against Blocker. Instead, however, of seeking for an exact definition of the phrase in question we think it will be more profitable for present purposes to refer to some of the cases, and particularly to those which are controlling authority here, where it has been held that rights acquired in virtue of existing laws and claimed to be vested, were not so far vested as to become property within the meaning of the Federal Constitution and to be for that reason beyond the reach of legislative action. Thus, in the case of Morley *v.* Lake Shore & Mich. So. R'y Co., 146 U. S., 162, a judgment had been obtained which under existing laws bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their propety without due process of law. In Campbell *v.* Hoyt, 115 U. S., 620, 628, the right to plead the statute of limitations against a personal indebtedness had accrued in favor of the debtor, when the bar of the statute was re-

moved by the adoption of a new constitution. It was held that the debtor had no right to complain. The court said, "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." In Ewell *v.* Daggs, 108 U. S., 143, a right which had accrued to a debtor to plead usury as a defense under a law that was in force when the contract was entered into, was taken away by a subsequent enactment and it was held that no valid objection could be urged against such legislation. In Butler *v.* Palmer, 1 Hill (N. Y.), 324, it appeared that at the time of the sale of a judg-
98 ment debtor's land under an execution, the law allowed him a certain time to redeem and the master's deed specified this period of redemption on its face. A subsequent statute repealed the law granting such period for redemption and prescribed a shorter period within which the right must be exercised. It was held that the right to redeem within the period named in the master's deed was not so far vested that it could not be shortened by legislative action. See also The People *v.* Livingston, 6 Wend., 526.

In Green *v.* Abraham, 43 Ark., 420, a mortgage improperly acknowledged had been placed of record, which by reason of a defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having brought replevin to recover the attached property from one who claimed it under the attachment, it was held, in substance, that the interest of the attaching creditor in the attached property was not vested but could be and that it was in fact displaced by the subsequent enactment validating the record of the mortgage. The following cases are similar to those already cited, and, as we think, uphold the same doctrine. Freeborn *v.* Smith, 2 Wall., 160, 175; Baker's Executors *v.* Kilgore, 145 U. S., 487; Terry *v.* Anderson, 95 U. S., 628, 633; Garrison *v.* City of New York, 21 Wall., 196, 205; Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 289; Baugher *et al. v.* Nelson, 9 Gill (Md.), 299, 309; Town of Danville *v.* Pace, 25 Grattan, 1, 15; Satterlee *v.* Matthewson, 16 Serg. & Raw., 169; Wilson *v.* Simon, 45 Atlantic Rep., 1022. It may be difficult in some cases to fix the precise date at which a right can be said to be fully vested and for that reason to have become property within the meaning of the Federal Constitution, when the right in question is purely of statutory creation, or has been acquired by pursuing some remedy which the law affords to suitors, and is in no sense an obligation arising out of contract; but we are of opinion that the right invoked in the case at bar was not vested on February 3, 1897, in any such sense as to be outside the sphere of legislative control. When called upon to resolve questions like the one in hand the courts have never deemed it necessary to close their eyes to the equities of the case but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws—was morally right and in accordance with justice and fair dealing. In an early case

(Foster *et al. v.* The Essex Bank, 16 Mass., 245, 273), Parker, C. J., remarked, "The truth is there is no such thing as a vested right to do wrong;" and this remark has been quoted with approval by the Supreme Court of the United States and other courts. Freeborn *v.* Smith, 2 Wall., 160, 175; Freeland *v.* Williams, 131 U. S., 405, 420; Goshorn *v.* Purcell, 11 Ohio St., 652; Town of Danville *v.* Pace, *supra*; Satterlee *v.* Matthewson, *supra*. And in Randall *v.* Kreiger, 23 Wall., 137, 149, the Supreme Court said, speaking with reference to a legislative act which impaired an existing title, "Claims contrary to justice and equity cannot be regarded as of that character (that is to say, as vested rights). Consent to remedy the wrong is to be presumed."

99 It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether Congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice and was right when viewed from a purely moral standpoint. If it was, a more liberal view may well be taken of its power to displace the attaching creditor's lien than would be permissible if its action was partial or arbitrary and without just cause or excuse.

Viewing the case for the purpose last indicated, it is manifest at a glance that Congress was influenced by the highest considerations of public policy to pass the act of February 3, 1897, and that in so far as the interpleader and others in a like situation were concerned, it was justified in stretching its constitutional powers to their utmost limit to prevent the consummation of a grievous wrong. The cattle in controversy had been bought and paid for with the money of the interpleader with the understanding that they should be mortgaged to secure its repayment. Such a mortgage was executed. The transaction was fair and honest and all the publicity was given thereto which the circumstances permitted. We understand the local law to be that the mortgage so executed was in any event good as against the mortgagor, for such was the decision in Main *v.* Alexander, *supra*. The attaching creditors' debt was contracted long prior to the purchase of the cattle and the execution of the mortgage and they had actual knowledge of its execution and of the record thereof before they caused the writ of attachment to be levied. The attaching creditors seem to have made a deliberate attempt to appropriate the property of the interpleader to the payment of another's debt by taking advantage of a defect in the law, doing so in utter disregard of the doctrine which has been generally accepted by courts of equity since the decision in Le Neve *v.* Le Neve, 3 Atkinson, 646, 2 Leading Cases in Equity, 35, that one who purchases property with full knowledge of another's interest therein and with intent to deprive him of that interest is a purchaser *mala fide*. Under these circumstances it was the duty of Congress to afford all the relief against the threatened wrong which could be afforded by a liberal interpretation of its legislative powers; and it is likewise the duty of the courts, in such a case, to construe those powers liberally, to the end that a wrong may not be perpetrated through the forms of law. It may be that there is a legal presump-

tion that when Congress extended the chapter of the Arkansas statute concerning mortgages over the Indian Territory, it was aware of the interpretation that had been placed upon the various provisions of that chapter by the supreme court of that State; but a legislative body is not omniscient, and whatever may be the presumption, we are unable to believe that Congress possessed such knowledge in fact, and that it intended to deprive non-residents of the Territory of the power to make a mortgage on personal property there located which would be effectual to protect mortgagees against the claims of third parties. We can conceive of no reason which would be liable to influence Congress to enact a law of that character and are therefore constrained to believe that the peculiar construction placed on sections 4742 and 4743 of the mortgage act, by the supreme court of Arkansas, was unknown to Congress when they were made applicable to the Indian Territory, and
100 that it made haste to cure what it deemed an obvious defect or omission in the law as soon as its attention was directed to the defect. The act of February 3, 1897, stands on the same plane, therefore, as a curative act and should be treated as a statute which was enacted for the purpose of remedying a mistake theretofore inadvertently made by the lawmaker. When the attention of Congress was directed to the peculiar construction that had been placed on the aforesaid sections of the mortgage act in the State from which it was borrowed, it found the controversy between the attaching creditors and the interpleader still pending and undetermined. The rights of the former were *in fieri*. No court had at that time decided that they were entitled as against the interpleader to subject the mortgaged property to the payment of their judgment against the mortgagor, and believing, doubtless, that such an adjudication, if made, would defeat rather than promote the ends of justice, it undertook to forestall a possible decision of that nature by validating the record of the interpleader's mortgage. We are of opinion that the concluding clause of the act of Congress of February 3, 1897, which was designed to accomplish that end, was a lawful enactment and not in conflict with any provision of the Federal Constitution, because at the date of its enactment the attaching creditors had no such vested right or interest in the cattle in controversy as the constitution was intended to protect against legislative action.

Learned counsel for the interpleader have argued at some length that the United States courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in Main *v.* Alexander, *supra*, because that decision is in conflict with other decisions of the supreme court of Arkansas on kindred questions and because it has been discredited by judicial criticism in the State of Arkansas and cannot be regarded as settling the true construction of the statute in controversy even in the State where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at the time the writ was levied and that this interest was a mere equity of redemption, the mortgage

being in any event good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed, but without expressing an opinion thereon, we prefer to rest our decision on the ground heretofore stated, that the act of Congress operated to validate the interpleader's mortgage.

The judgment of the United States court of appeals in the Indian Territory is accordingly reversed and annulled and the judgment of the United States court in the Indian Territory for the northern district thereof, which was rendered at its March term, 1899, being for the right party, is in all things affirmed.

SANBORN, *Circuit Judge*, dissenting:

The validity of the act of February 3, 1897, as construed by the majority of this court, in view of the basic principles of the social compact and of the 5th amendment to the Constitution, which declares that "no person shall be deprived of life, liberty or
101 property without due process of law" is best tested by a candid look at its legal effect upon the property of the parties to this action. It is conceded by the opinion of the majority and it was settled by the statutes then in force in the Indian Territory and by the uniform decisions of the supreme court of Arkansas interpreting those statutes from 1843 to 1891 (Main *v.* Alexander, 9 Ark., 112, 147; Hannah *v.* Carrington, 18 Ark., 85, 105; Jacoway *v.* Gault, 20 Ark., 190, 193; Haskell *v.* Sevier, 25 Ark., 152, 158; Ford *v.* Burks, 37 Ark., 91, 94; Dodd *v.* Parker, 40 Ark., 536, 540; Watson *v.* Lumber Co., 49 Ark., 83, 87; Cross *v.* Fombey, 54 Ark., 178, 184) that on the morning of February 3, 1897, the defendants in error had a first and specific lien impervious to the attacks of the mortgagee, the Evans-Snider-Buel Company, either at law or in equity, for the amount of the judgment which they had obtained in their attachment suit against Blocker, $55,875.71, upon the cattle that had been seized under the attachment, which were found to be worth $75,000. When that day closed, if the conclusion of the majority is right in this case, the Congress of the United States had by the act of February 3, 1897, divested the defendants in error of all beneficial interest in the cattle or in the lien which they held upon them and had granted to the Evans-Snider-Buel Company a first lien for $130,000 upon these cattle and had thereby deprived the defendants in error of all real interest in the stock. In other words, before the act of February 3, 1897, was approved, the defendants in error had a first lien upon the cattle which was worth $55,875.71, and the mortgagee had an inferior lien which was worth only the difference between the amount of this first lien and $75,000 or $19,124.29. The instant that act was approved the mortgagee had a first lien on the cattle for $130,000, which was worth $75,000 and the defendants in error had nothing. The act of Congress had the effect to transfer instantly property of the value of $55,875.71 from the defendants in error to the plaintiff in error, The Evans-Snider-Buel Company. It is not pretended that this was accomplished by any process of law, due or undue. It was done, if done at all, by

the arbitrary act of the Congress of the United States without notice, trial or hearing.

In my opinion an act of Congress or of a State legislature which has such an effect not only violates the fifth amendment of the Constitution, but is beyond the powers of the legislative department of of a republican government. Calder *v.* Bull, 3 Dallas, 383, 388; Tyrrell *v.* Rountree, 7 Pet., 463, 468; Gunn *v.* Barry, 15 Wall., 610, 622; Fletcher *v.* Peck, 6 Cranch, 87, 135; Tillotson *v.* Millard, 7 Minn., 419; Bougher *v.* Nelson, 9 Gill's Rep., 299, 307; Regents *v.* Williamson, 9 Gill & J., 365, 408; Merchants' Bank *v.* Ballou, 32 S. E. (Va.), 481, 483; Wade on Retroactive Laws, secs. 159, 191; Gilman *v.* Tucker, 28 N. E., 1046; Ratcliffe *v.* Anderson, 31 Gratt., 105; Murphy *v.* Garkins, 28 Gratt., 207, 222; Alter's Appeal, 67 Pa. St., 341; McCarty *v.* Hoffman, 23 Pa. St., 507; Greenough *v.* Greenough, 11 Pa. St., 489; Waples on Attachment (2nd ed.), 17, 736; 1 Shinn on Attachment, sec. 452, 322; Frellson *v.* Green, 19 Ark., 376; Bergman *v.* Sells, 39 Ark., 97, 101; Cole *v.* Cunningham, 133 U. S., 107, 116; Richardson *v.* Adler, 46 Ark., 49; Wade on Retroactive Laws, secs. 171, 173. In the discussion of the question at issue it must be borne in mind that it was not a mere judgment against the person or the right to enforce such a judgment or a mere general lien to secure it of which the defendants were here deprived. But it was a specific and absolute lien fixed by the judgment of the court upon personal property which had been reduced to the possession of the officer of that court and which was properly owned by the defendants in error and worth more than $55,000. In Calder *v.* Bull, 3 Dallas, 388, Mr. Justice Chase said: "There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the Government was established. * * * A law that punishes a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B; it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it." In Tyrrell *v.* Rountree, 7 Pet., 466, after a judgment had been rendered in an attachment suit and a writ of *venditioni exponas* issued to sell land which had been attached the county was divided by a legislative act and the claim was made that this divested the lien upon the property in the new county, so that a sale thereof could not be made. Chief Justice Marshal said: "The counsel for the plaintiffs in error has argued the cause, as if the process under which the sale was made had been the usual execution awarded on a judgment rendered against a person brought into court by regular process. Without inquiring whether his objections to the charge would have been well founded, had that been the character of the case, it is sufficient to observe, that, in the actual cause,

102

the land itself was attached. Not having been released, it remained in the custody of the officer, subject to the judgment of the court. An interest was vested in him, for the purposes of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment, and was already condemned by the judgment of the competent tribunal. The subsequent division of the county could not divest this vested interest, nor deprive the officer of the power to finish a process which was rightly begun."

In Gunn *v.* Barry, 15 Wall., 610, 622, a case was presented in which a creditor had obtained a judgment against a defendant, which was a lien upon a large portion of his land, and before that judgment was enforced by execution sale the State of Georgia adopted a constitution which by its terms exempted from execution sale all the land of the defendant in the judgment. Mr. Justice Swayne in delivering the opinion of the Supreme Court said of this constitution: "The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates
103 the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact." No further authority would seem to be required to establish the propositions that the specific lien upon the cattle which the defendants in error had perfected by their judgment against Blocker was a "vested right of property," and that its transfer from them to the mortgagee was "taking one person's property and giving it to another without compensation." If, however, other authority is desired it will be found in the decisions to which reference has been made above.

A careful perusal of the authorities referred to in the opinion of the majority discloses no decision of the Supreme Court and no persuasive opinion of any court which sustains the proposition that the legislative department of our Government may by an arbitrary act deprive one of a specific and perfected lien upon property which is worth more than $50,000 and vest it in another without compensation. The decisions of the Supreme Court cited by the majority, to the effect that interest on a judgment is a penalty for its non-payment and that from the time of the passage of a law it may be reduced by legislative enactment even upon judgments rendered before the act passed (Morley *v.* Lake Shore & Michigan Southern R'y Co., 146 U. S., 162), that the remedy for the enforcement of a personal judgment (which created no lien) against a municipality for damages resulting from mob violence may be lawfully taken away because the collection of such damages is a mere matter of public

policy, while the removal of the remedies for the collection of an ordinary judgment for tort by legislative act would be unconstitutional (Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 291), that the removal of the bar of the statute of limitations against a personal debt does not impair any contract of the debtor or deprive him of any property which he possessed, while the removal of the bar of such a statute against the assertion of a claim to either personal or real property is a violation of the 5th amendment to the Constitution and a taking of property without due process of law (Campbell *v.* Holt, 115 U. S., 620, 623, 628), that a debtor has no vested right to plead and recover the penalty prescribed by a statute for usury and that a law repealing such a statute may well apply to prior contracts (Ewell *v.* Daggs, 108 U. S., 143, 150) seem to me to have no tendency to show that the Supreme Court has ever sustained or intimated that it would permit the bold taking of $50,000 worth of private property from one person to give it to another without compensation. It would be unprofitable to review the cases cited from the State courts in the opinion of the majority because the decisions of the Supreme Court to which reference has been made are conclusive upon this question and render the consideration of other authorities unnecessary. It may, however, be remarked in passing that the decision in Butler *v.* Palmer, 1 Hill (N. Y.), 324, that after the
104 sale of a judgment debtor's land under execution a statute may be lawfully passed curtailing the period of redemption is by no means the settled law of the land and that the counter-proposition is well sustained by reason and authority. Willis *v.* Jelinek, 27 Minn., 18; O'Brien *v.* Kreuz, 36 Minn., 136; Heyward *v.* Judd, 4 Minn., 483; Hillebert *v.* Porter, 28 Minn., 496, and the cases there cited. Attention may also be called to the fact that the decision of the supreme court of Arkansas in Green *v.* Abraham, 42 Ark., 420, 425, is inapplicable to the questions presented in this case because it rests upon the proposition that the mere levy of an execution upon personal property under a personal judgment which creates no lien vests no right of property in the judgment debtor and therefore a curative act validating a mortgage upon the property seized did not constitute the taking of private property for private use. The decision rests upon the proposition that the levy of the execution vested no right of property. The later decisions of the court, however, conclusively hold that the entry of a judgment against the debtor in an attachment suit completes and perfects the lien of the attachment and vests a right of property in the judgment creditor. Richardson *v.* Adler, 46 Ark., 49; Frellson *v.* Green, 19 Ark., 376; Bergman *v.* Sells, 39 Ark., 97, 101.

The argument that this specific lien upon the cattle evidenced by the attachment and judgment might be stricken down by an arbitrary act of Congress because there are authorities which hold that the repeal of a statute allowing attachments subsequent to the levy of a writ and before judgment against the debtor lawfully destroys the inchoate lien of the attachment, is a *non sequitur*, is supported by no authority and is contrary to all the decisions upon the question which have come under my notice. The lien of an attachment is

inchoate and conditional upon the entry of a judgment against the debtor until that judgment is entered, but perfect, absolute and unassailable after such a judgment and a judgment sustaining the attachment have been rendered. There is respectable authority upon each side of the question whether or not a legislative act impairing or destroying the inchoate lien of an attachment before judgment destroys a vested right of property within the meaning of the 5th amendment to the Constitution. Hall *v.* Stevens, 65 Mo., 670, 681; Hannahs *v.* Felt, 15 Iowa, 141; Day *v.* Madden, 9 Col. App., 464; Mulnix *v.* Spratlin, 10 Col. App., 390. It is useless to consider or discuss that question here, for the lien of the defendants in error is not of that character. On January 29, 1897, three days before the act of February 3 was passed, they obtained a judgment against the defendant Blocker not only that the latter was indebted to them in the sum of $55,875.71, but also that their attachment of these cattle be sustained. The amount of the claim of the defendants in error had been adjudicated, their lien by attachment upon the cattle which were then in the custody of the court and their right to the sale of these cattle and to the application of their proceeds to the payment of their judgment had been adjudged to be perfect and absolute by a competent court having jurisdiction of their case three days before the act of February 3, 1897, was passed. The property of the defendants in error in the cattle was strictly analogous to, and as
105 great as the property of a mortgagee in mortgaged real estate after a decree of foreclosure of his mortgage and of sale of the land to satisfy his debt has been rendered against the mortgagor.

May the legislative department of the Government lawfully deprive such a mortgagor of his lien, his property, and transfer it to a stranger or to the holder of an inferior lien by its mere fiat? If not, then Congress could not lawfully deprive these defendants in error of their lien, their vested right, their property in these cattle, and transfer it to the Evans-Snider-Buel Company by the act of February 3, 1897. The lien which they acquired by their attachment and their judgment was impervious to attack, either at law or in equity. It was absolute, perfect, enforceable, assignable and salable. It was a complete and vested right. It was property worth $55,875.71 and was as completely vested in the defendants in error and as perfectly protected by the law of the land as acts of parties, laws and decisions can vest or protect any property. All the authorities are that while the lien of an attachment is inchoate and contingent until a judgment against the debtor is rendered, yet, after that judgment has been rendered the lien of the attachment is merged in the judgment which relates back to the date of the attachment and evidences a perfected and absolute right to apply the attached property to the payment of the judgment and that this is a vested right of property as sacred and as valuable as it is possible to secure under the laws of our land. Cole *v.* Cunningham, 133 U. S., 107, 116; National Bank of Commerce *v.* Reithmann, 79 Fed., 582, 583; 25 C. C. A., 101, 102; 49 U. S. App., 144, 146; Richardson *v.* Adler, 46 Ark., 43, 49; Waples on Attachment (2nd ed.), §§ 17, 736; 1 Shinn on Attachment, §§ 452, 322; Frellson *v.* Green, 19 Ark., 376; Bergman

v. Sells, 39 Ark., 97, 101: 1 Black on Judgments, 298; 1 Freeman on Judgments, § 90; Tillotson *v.* Millard, 7 Minn., 419; Lyon *v.* Sanford, 5 Conn., 545, 547, 549; Wade on Retroactive Laws, §§ 171, 173. In National Bank of Commerce *v.* Reithmann, 79 Fed., 582, 583; 25 C. C. A., 101, 102; 49 U. S. App., 144, 146, this court said: "An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution." In Richardson *v.* Adler, 46 Ark., 49, the supreme court of that State said: "The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment and which could not be divested by any change in the status of the parties." Mr. Shinn in his work on attachment at section 572 declares that "a judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or rather it takes the place of such lien and relates back to the time of the levy; and takes priority over all subsequent attachments, liens or conveyances." Mr. Waples in his work on attachment at section 17 says: "By the law of relation an attachment judgment retroacts to the time the property was first attached; to the time it was first subjected to garnishment; so that no encumbrances put upon it by its owners since that time can have higher rank than the attaching creditor's lien. Such retroaction
106 makes the lien perfect from its first inception as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself."

There is no conflict in the authorities upon this question. The principles which have been adverted to are indisputable and it follows from them inevitably that if a vested right or a vested interest in property is, as the majority are willing to concede, "some right or interest in property that has become fixed or established and is no longer open to doubt or controversy," then the defendants in error had such a right and interest in the cattle in the custody of the court on January 29, 1897, after their judgments against Blocker had been rendered and until the act of February 3, 1897, was approved.

The suggestion of the majority that the judgment against Blocker did not evidence a vested right in the cattle in the defendants in error as against the Evans-Snider-Buel Company does not seem to be founded in fact, because, while that judgment did not estop the company from claiming the cattle from the defendants in error and from litigating their claim, it did vest in the defendants in error an established lien and interest in the cattle superior to that of the Evans-Snider-Buel Company which was no longer open to doubt or controversy in the courts or under the law of the land. The Evans-Snider-Buel Company was unable to doubt or to controvert it by any proceeding at law or in equity. The only way which they found to open this vested right and interest to doubt or to contro-

versy was to secure this arbitrary act of Congress boldly taking it from the defendants in error and transferring it to this mortgagee.

If the suggestion of the majority was intended to be that this act of Congress does not violate the constitution because there was no adjudication of a court which estopped this mortgagee from claiming the property of these defendants and litigating its unfounded claim, that suggestion proves too much, because it would establish the proposition that Congress could lawfully take this property from the defendants in error and give it to any one of the inhabitants of the United States except Blocker and the still broader proposition that Congress may lawfully deprive any man of his property provided only that it does not transfer it to some party who has been estopped from litigating an unfounded claim against it by the judgment of some court. Judgments in favor of the owners and against all the world are not indispensable to the existence of vested rights of property and the fact that the defendants in error had no judgment against the Evans-Snider-Buel Company did not detract from the existence or the inviolability of their vested property in these cattle, since their right to them was established and was impervious to the attacks of the mortgagee under the law of the land.

Nor does the argument that this act of Congress which takes from the defendants in error a vested right of property worth more than $55,000 and gives it to the Evans-Snider-Buel Company should be held to be no violation of the prohibition of the constitution because "it was morally right and in accordance with justice and fair dealing" seem persuasive to me. The moral right or wrong of
107 an act of Congress which takes the property of A and transfers it to B is not in my opinion the true nor is it a safe test of the violation of the fifth amendment to the Constitution. A fatal objection to such a test is that the standard of moral right or wrong in the minds of men is variant. An act taking some of the property of a bad man and giving it to a good man, one taking part of the property of a rich man and giving it to a poor man, might be thought to be morally right and in accordance with justice and fair dealing by some, while it would be thought unjust and morally wrong by others. This very case illustrates the objection to this rule. To the majority of this court it seems to be morally right and in accordance with justice and fair dealing to take from these judgment creditors an established lien upon property which they had acquired in strict accord with the law of the land to secure a just debt and which was worth more than $55,000 and to transfer this right of property to a mortgagee which had taken mortgages that under that law were fraudulent and void as against these judgment creditors, while to the minority this act seems to have been morally wrong and subversive of the basic principles of a government established to protect the rights of person and of property. To me the fraudulent mortgagee seems to have no equitable or moral right to the cattle in question superior to that of the holder of the lawful lien. There was certainly nothing in the consideration or purpose of the loan made by the mortgagee to give it a superior equity over that of the judgment creditors. One has no higher right to the repayment of money

loaned to enable a debtor to purchase cattle than he has to the repayment of money loaned to enable him to buy horses or land or bread. The consideration and purpose of the debt of Blocker to the defendants in error does not appear in this record, but the presumption is that it was a valuable consideration and a worthy purpose, for the debt is evidenced by the judgment of a competent court of the State of Texas rendered in 1887. These defendants in error had waited for the payment of their debt more than ten years when they acquired their lien upon these cattle, while the Evans-Snider-Buel Company had made its loan within a year preceding that date. So far then as the consideration and purpose of these two debts are concerned those of the defendants in error must be deemed to be as meritorious as those of the mortgagee and as the defendants in error had waited more than ten years for their money while the mortgagee had not waited a year certainly it was not unjust or inequitable for them to secure the payment of their debt first. Nor is it perceived that there is anything in the character and the acquisition of the liens of these parties which gave to the mortgagee any higher right or superior equity to the payment of its debt over those which the judgment creditors held. The judgment creditors in violation of no law or public policy, but in strict accord with the statutes and the decisions of the courts interpreting them established by the judgment of a competent court a first and unassailable lien upon the cattle to secure their debt. The Evans-Snider-Buel Company took mortgages upon the cattle unaccompanied with any change of possession which were under the common law *prima facie* fraudulent and void as against the defendants in error (Pyatt *v.* Powell, 51 Fed., 551; 2 C. C. A., 371; 10 U. S. App., 200) and which under the statutes in the Indian Territory and under the uniform interpretation of them for 48 years by the courts of Arkansas which came to the Indian Territory as a part of those statutes, were conclusively fraudulent and void as against the defendants in error and as against all creditors of the mortgagor, although the latter had actual notice of their existence. Main *v.* Alexander, 9 Ark., 112, 117; Jacoway *v.* Gault, 20 Ark., 190, 193; Hannah *v.* Carrington, 18 Ark., 85, 105; Dodd *v.* Parker, 40 Ark., 540; Watson *v.* Lumber Co., 49 Ark., 83; Cross *v.* Fombey, 54 Ark., 179, 184. Now has a creditor who has procured mortgage liens from his debtor which are fraudulent and void as against other creditors a moral right to the mortgaged property so much higher than that of judgment creditors who have established a valid and superior lien upon it of the value of $55,000 in accordance with the law of the land that a court ought to sustain an arbitrary act of the legislative department of the Government which takes this $55,000 worth of property from the lawful lienholder without compensation and gives it to the fraudulent mortgagee in the teeth of the fifth amendment to the Constitution which declares that "no person shall be deprived of life, liberty or property without due process of law?" I think this question should be answered in the negative, and, whether or not this should be the answer, it seems to me that the constitutionality of an act of Congress which deprives men of their property without any process of law is not to be determined by a

108

consideration of the moral right or wrong of the act or of the equities of those who lose and those who gain by the fiat. Constitutions and laws are enacted to declare and command the right and to forbid the wrong. Any theory that their violation may be permitted or excused or overlooked because in the varying opinions of any man or set of men that violation was morally right or in accordance with justice and fair dealing is subversive of the fundamental principles of government and ought not to be sustained. The adoption of such a theory would be in effect to add to the inhibition of the Constitution an exception which it does not contain, so that it would read: "No person shall be deprived of life, liberty or property without due process of law except in cases in which it is morally right and in accordance with justice and fair dealing to do so." When the people adopted the Constitution they determined that it was morally wrong to deprive any person of his property without due process of law under any circumstances. They engrafted no exception upon this prohibition and it is not the province of the courts to do so. The inhibition is clear, imperative and without exception. It prohibits the deprivation of any man of his property without due process of law. The act of February 3, 1897, as it has been construed by the majority of the court did in my opinion deprive the defendants in error of their property to the amount of more than $55,000 and was therefore to that extent unconstitutional and void.

For the reasons which have now been stated, perhaps too much at length, I am unable to concur in the opinion and conclusion of the majority in this case. I agree with the unanimous opinion of the court of appeals of the Indian Territory in which Judge Clayton has so logically, forcibly and to my mind convincingly presented the reasons why the act of February 3, 1897, had no effect upon the rights of the parties in this action and why the judgment lien of the
109 defendants in error was superior to the claims of the fraudulent mortgagee. McFadden *v.* Blocker, 48 S. W., 1043, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053.

The true construction of the act of Congress probably is as the court of appeals of the Indian Territory held, that it merely validated mortgages made by non-residents from the date of the passage of the act and had no retroactive effect. 48 S. W., 1048, 1053; Sutherland on Statutory Construction, § 463; Chew Heong *v.* United States, 112 U. S., 536, 539; Summer *v.* Mitchell, 10 South., 562. But if this is not the proper construction the act falls under the ban of the fifth amendment to the Constitution and is violative of the fundamental principles of republican government, and in either event it was ineffectual to take away the established lien of the defendants in error and to transfer their property to the mortgagee. For these reasons the judgment below should in my opinion be affirmed.

Filed November 19, 1900.

110 (*Judgment.*)

And on the nineteenth day of November, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *vs.* W. P. McFADDEN in His Own Right and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased.	No. 1403. In Error to the United States Court of Appeals in the Indian Territory.

MONDAY, *November* 19, 1900.

This cause came on to be heard on the transcript of the record from the United States court of appeals in the Indian Territory, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said United States court of appeals in the Indian Territory in this cause be, and the same is hereby, reversed and annulled with costs, and that Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider have and recover against W. P. McFadden in his own right and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, the sum of one hundred four and $\frac{70}{100}$ dollars for their costs in this behalf expended, and have execution therefor, except as to said executors.

It is further ordered and adjudged by this court that the judgment of the United States court for the northern district of the Indian Territory in this cause be, and the same is in all things hereby, affirmed, and that this cause be, and the same is hereby, remanded to the United States court for the northern district of the Indian Territory for proceedings therein according to law and justice.

November 19, 1900.

111 (*Petition for Writ of Error.*)

And on the thirtieth day of November, A. D. 1900, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Supreme Court of the United States.

W. P. H. McFADDIN in His Own Right and W. P. H. McFaddin and James McFaddin, Executors of William McFaddin, Deceased, Plaintiffs in Error,

vs.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, HENRY M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Defendants in Error.

Petition for writ of error.

To the Honorable Chief Justice and Associate Justice- of the Supreme Court of the United States:

Your petitioner W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiffs in error in the above-entitled cause, respectfully show that the said above-entitled cause i*n* now pending in the United States circuit court of appeals for the eighth circuit, and a judgment has been therein rendered reversing the judgment in the United States court of appeals for the Indian Territory and affirming the judgment of the United States court in the Indian Territory in and for the northern district of the Indian Territory and having by consent of parties rendered judgment in said cause; that the matter in controversy in said suit exceeds $1,000.00, besides costs, and that the jurisdiction of none of the other courts above mentioned is dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of the different States, and that this case
112 does not arise under the patent laws nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

And therefore your petitioners would respectfully pray that a writ of error be allowed them in the above-entitled cause, directing the clerk of the United States circuit court of appeals for the eighth circuit to send the record and proceedings in said cause, *will* all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error may be reve*i*wed and, if error be found, corrected, according to the laws and customs of the United States.

W. P. H. McFADDIN
In His Own Right and
W. P. H. McFADDIN AND
JAMES A. McFADDIN,
Executors of William McFaddin, Deceased,
By their attorneys, WILLIAM T. HUTCHINGS,
NAPOLEON B. MAXEY.

(Endorsed:) Supreme Court of the United States. No. —. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Petition for writ of error. Filed Nov. 30, 1900. John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the thirtieth day of November, A. D. 1890, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Supreme Court of the United States.

W. P. H. McFADDIN in His Own Right and W. P. H. McFADDIN and James A. McFaddin, Executors of William McFaddin, Deceased, Plaintiffs in Error,

vs.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, HENRY M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Defendants in Error.

113 *Assignment of Errors.*

Now comes W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiff- in error in the above-entitled cause, by their attorneys, and say that in the foregoing record and proceedings there is manifest error in the action and rulings of the United States court for the Indian Territory and then northern district thereof, as well as in the action, rulings, and opinions of the United States circuit court of appeals for the eighth circuit, in this, to wit: Said United States court in the Indian Territory, northern district, erred:

1.

In admitting in evidence the mortgages marked "Exhibits A, B, C, and D."

2.

In permitting the witness Atwater to testify as follows: "Q. Mr. Atwater, please state to the court and jury whether, if you know as a matter of fact, it was Blocker's money that bought these cattle for which these mortgages were executed or whether it was money of Evans Snider-Buel Co. Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advanced the principal? A. Evans Snider-Buel Co. advanced the money. Q. Did the Evans-Snider Buel Co. advance all the money that went into these cattle? A. Yes, sir; all of it."

3.

In directing the jury to return a verdict for the interpleader.

4.

In overruling the motion for a new trial and in entering judgment on the verdict in this case against plaintiffs' objection.

And the said United States circuit court of appeals erred:

1.

In reversing the judgment of the United States court of appeals for the Indian Territory.

2.

In affirming the judgment of the United States court in the Indian Territory, northern district, because of each — several
114 errors of the latter court as to its action and rulings, as to each and every one of the errors above specified.

Wherefore, and for divers other errors appearing on the face of said record, W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, pray that said proceedings, as well as the said judgment of both the United States circuit court of appeals for the eighth circuit and the United States court in the Indian Territory, northern district, be reversed.

WILLIAM T. HUTCHINGS,
NAPOLEON B. MAXEY,
Attorneys for Plaintiffs in Error.

(Endorsed:) No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Company *et al.* Assignment of errors. Filed Nov. 30, 1900. John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the seventeenth day of December, A. D. 1900, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the 8th Circuit.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error,

vs.

W. P. H. MCFADDIN in His Own Right and W. P. H. MCFADDIN and James A. McFaddin, Executors of William McFaddin, Deceased, Defendants in Error.

Know all men by these presents that we, W. P. H. McFaddin in his own right and W. P. H. McFaddin and James McFaddin, executors of William McFaddin, deceased, principals, and the United States Fidelity & Guaranty Co., sureties, are held and firmly
115 bound unto Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider in the full and just sum of $500.00, to

be paid to the said Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, their heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 28th day of November, in the year of our Lord one thousand nine hundred.

Whereas lately, in the November term of the United States circuit court of appeals for the 8th circuit, in this suit, depending in said court, between Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error, and W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, judgement was rendered against the defendants in error, reversing the judgement of the United States court of appeals for the Indian Territory and affirming the judgement of the United States court in the Indian Territory, in the northern district, and the said W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, have obtained a writ of error in the Supreme Court of the United States to reverse the judgement in aforesaid suit, and a citation directed to the said Evans Snider Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, citing and admonishing them to appear in the United States Supreme Court, at the city of Washington, District of Columbia, thirty days from and after the date of said citation:

Now, the conditions of the above obligation is such that if the said W. P. H. McFaddin in his own right and W. P. H. McFaddin and James McFaddin, executors of William McFaddin, deceased, shall prosecute said writ of error to effect and to answer the costs if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

116 W. P. H. McFADDIN,
By WM. T. HUTCHINGS, *Att'y.*
W. P. H. McFADDIN AND
JAMES A. McFADDIN,
Ex'ors of Wm. McFaddin, Dec'd.
By WILLIAM T. HUTCHINGS, *Att'y.*
[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,
By W. E. BOZEMAN,
General Agent, Muscogee, Ind. Ty.

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

December 14, 1900.

Premium on bond, $5.00.

[Two-cent internal-revenue stamp, canceled.]
[One-cent internal-revenue stamp, canceled.]

(Endorsed:) No. 1403. Evans-Snider-Buel Co. *et al.*, plaintiffs in error, *vs.* W. P. H. McFaddin, etc., *et al.* Bond on writ of error. Filed Dec. 17, 1900. John D. Jordan, clerk.

(*Writ of Error.*)

And on the seventeenth day of December, A. D. 1900, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error, and W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, defendants in error, a manifest error hath happened, to the great damage of the said defendants in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of December, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Writ of error. Filed Dec. 17, 1900. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 18th day of December, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

118 (*Citation.*)

And on the seventeenth day of December, A. D. 1900, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with acknowledgment of service thereon, is hereto attached and herewith returned.

119 UNITED STATES OF AMERICA, *ss:*

To Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 14th day of December, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Citation. Filed Dec. 17, 1900. John D. Jordan, clerk.

Due legal and timely service of the within citation is hereby acknowledged in behalf of all and each of the defendants in error therein named this 17th day of December, A. D. 1900.

H. M. POLLARD,
Of Counsel for Defendants in Error.

120 (*Clerk's Certificate.*)

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred nineteen pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein Evans-Snider-Buel Company *et al.* were plaintiffs in error and W. P. McFadden *et al.* were defendants in error, No. 1403, May term, 1900, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error and the original citation, with acknowledgment of service thereon, are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this eighteenth day of December, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 18,005. U. S. C. C. of appeals, 8th circuit. Term No., 520. W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiffs in error, *vs.* Evans-Snider-Buel Company, C. W. Turner, *et al.* Filed December 21, 1900.